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ENACTING REFUGEES

An Ethnography of Asylum Decisions

by

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Thesis submitted in fulfilment of the requirements for the degree of
PhD

Department of Politics and International Studies
The Open University

Supervisors

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Abstract

When a foreigner enters the immigration department in Rio de Janeiro and places an asylum request, a complex legal machinery is put in motion to decide if this claim for protection is warranted or not. The process of status determination begins. The end comes a few months later, when the asylum seeker sits across from a police officer and is informed of whether the claim for refugee status has been accepted or denied. Request and decision are the two poles of this narrative. But how is the difference established between those who deserve and don't deserve protection? Thematically, the research seeks to enrich our understanding of how refugees and migrant are distinguished during status determination. Conceptually, the study serves as an opportunity to reflect on the shortcomings I see in how the scholarship on migration and borders usually conceives the notion of 'decision'. Drawing on a series of arguments developed in the field of Science Studies, the thesis puts forward a case for approaching asylum decisions in a way that is less focused on the discretion exercised by decision-makers and more attentive to how contingency and heterogeneity impact the enactment of refugees.

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I am extremely grateful to my supervisors, Jef Huysmans and Nick Bingham. This study assumed different forms and faced many detours along the way, but Jef and Nick were always there to support me.

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I am grateful to all Cáritas staff for welcoming me in Tijuca and volunteering their time. For fear of exposing them in any way, I choose not to name the other Conare officers, police agents, lawyers and social workers with whom I had an opportunity to talk to during my time in Brazil. I am grateful to them for answering my questions and allowing me to look over their shoulders while they worked. I can think of few professions that offer a more direct opportunity to do good than the work of examining asylum requests. Some of these examiners took the opportunity, while others didn't. But I learned something from all of them.

While writing this study, I had the privilege of discussing my ideas with many brilliant scholars. For their encouragement, I would like to specifically thank Claudia Aradau, Didier Bigo, Paulo Esteves, Emmanuel Pierre-Guittet, Marieke de Goede, Engin Isin, Vivienne Jabri, John Law, Annemarie Mol, Carolina Moulin, João P. Nogueira, Evelyn Ruppert, Helen Verran, Rob Walker and, most specially, Beto Yamato. Thanks also to Helen Arfvidsson, Diogo Dario, Médéric Martin-Mazé, Stephan Scheel and all members of the security/mobility workshops at the universities of Kent and Amsterdam. I am grateful to them all for their comments and reading suggestions, which helped greatly to improve this study.

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When I recall my happiest moments while working on this study, the names of Vivian Alt, Peter Carlson, Jorge Estévez, Zaira Lanna, Chris Leite, Emma McCluskey, Wendy Miller, Edu Plastino, Mari Plum, Edu von Ristow, Dani Rotbande, Anninha Salles, Alvaro Soares, Steph de Melo, Juju Teixeira, John Wielgosz and Betinho Yamato come to mind.

I am also extremely thankful to all my friends in Brazil, to whom I owe many laughs. Alan Oliveira deserves special mention among these. The methodological precept to ‘follow your object around’ doesn’t anticipate the car and the petrol that goes into it. I thank Alan for all the rides to airports and police stations. Above all, I thank him for being such a great friend.

My family, biological or otherwise, allowed me to remain sane during these four years – even if only partially. I thank in particular the Rocha de Siqueira clan, whose generosity and unshaken sense of humour made this work better by making me feel better.

Finally, if it is true that we are all knots in a network, then Isabel and I must have gotten entangled. I couldn’t be me without her.

‘What is the use of studying philosophy if all that it does for you is to enable you to talk with some plausibility about some abstruse questions of logic, etc., and if it does not improve your thinking about the important questions of everyday life (...)’

Ludwig Wittgenstein

‘Simplicity is not a simple thing.’

Charles Chaplin

Introduction

Refugee Status Determination is a rather formal name for a very sensitive task. Refugee status can change a person's story, bring an end to suffering and allow the newly declared refugee to start a safe and dignified life. Hannah Arendt was a refugee, as were Albert Einstein and Sigmund Freud. What would have become of our arts and sciences, of our philosophy and politics, had they been denied refuge? Yet it is perhaps when asylum is denied that the delicate nature of status determination is made plain. For a negative decision can quite literally mean death for the asylum seeker. Gloomy stories of failed applicants being received with torture after deportation or being kept for years in humanitarian camps are not as uncommon as we would like to believe.¹ For the person awaiting a ruling, as for the officers examining the case, few policy decisions can be more vital than answering the very simple question that the words 'status determination' represent: after all, *is this person a refugee or not?*

This study is about the practices through which an answer to this question is produced. It is a study on how the legal condition of being a refugee is granted or denied to men and women. Is this asylum seeker a refugee and therefore allowed to stay and seek reinsertion in the political community? Or is this foreigner a bogus applicant, better characterized as an economic migrant, and therefore outside the grasp of refugee protection? This study dwells on how this distinction is established in practice during the work of deciding whether to accept or deny asylum requests.

To examine this topic, I propose to undertake an ethnography of asylum decisions, taking as a setting the work of status determination in Brazil. Two reasons make the case ideally suited for research. First, studying status determination in Brazil will allow us to learn more about how migration is governed beyond Europe and North America, as much of the literature on International Relations is still limited to these regions. Second, as Brazil is a democracy and a former European colony, its legal system will be fairly familiar to western readers. A study of how migrants and refugees are set apart in Brazil can thus offer interesting contrasts for those studying the work of controlling borders and governing migration from the Global North.

As in other western democracies, the issue of refugee protection has been gaining salience in Brazil. The number of asylum requests has increased almost tenfold between 2010 and 2014.² Like their counterparts in the Global North, Brazilian politicians struggle to balance the conflicting political pressures linked to this increase. On the one hand, in order to protect Brazil's reputation as a liberal country, they are expected to protect asylum seekers and respect human rights. On the other, they seek to appease those who start to voice concerns over the costs and social impacts supposedly associated with the increase in arrivals.³ A 'fair and efficient' determination process is hailed by the government as a way out of this tight spot, making it possible to distinguish 'genuine refugees', who are protected by international law, from 'other kinds of migrants', who are subjected to different regulations.⁴

Thematically, the primary aim of the research is to enrich our understanding of how refugees and migrant are distinguished during status determination. Conceptually, the study will serve as an opportunity to reflect on the shortcomings I see in how the scholarship on migration and borders has tended to conceive the notion of 'decision'. Drawing on a series of arguments developed in the field of Science Studies, the thesis will put forward a case for approaching asylum decisions in a way that is less focused on the discretion exercised by decision-makers and more attentive to how contingency and heterogeneity impact the enactment of cases.

To articulate this alternative approach, the study will contrast it to what I call the 'declaratory picture' of asylum decisions. This picture is a composite of assumptions about who takes part in asylum decisions and about where and when these decisions are made. This picture is not something to which practitioners subscribe without nuances. But it does express some proclivities in reasoning that struck me as recurrent during my encounters with asylum seekers and case examiners.

Judging by this declaratory picture, decisions to grant or deny requests are made by decision-makers as the final product of a series of determination practices, which are designed to disclose the legal fit, empirical support and internal consistency of the case. At the end of the determination process, the reality of the asylum seeker as a migrant or as refugee is not so much decided by decision makers as it is *declared* by them.

I shall contend in this study that this way of accounting for how migrants and refugees are distinguished relies on an understanding of decision which is not only conceptually poor, but also politically disengaging. What this picture tells us about how the border between migrant and refugee is enacted is not only hard to sustain, but also disempowering. It forecloses the possibility of contesting this border by diverting our attention from how contingency and heterogeneity impact the outcome of requests.

In contrast to this declaratory picture, I want to show that determination practices do not just disclose the anterior reality of the asylum seeker, but rather *enact* what comes to count as this anterior reality. I want to *encourage scepticism* towards the use of legal fit, empirical support and consistency as justifications for denial. And I hope to persuade the reader that it is important to *decentre* the way we conceive decision when studying the work by which migrants and refugees are set apart.

To encourage the adoption of this enactment approach, the argument will have two dimensions – one deconstructive and one reconstructive – both of which will run in parallel. In an exercise of cross-fertilization, I shall borrow concepts from the field of science studies and put these to use in the discussion on whether migrants and refugees represent different social groups.

Deconstructively, I will adapt this science studies toolset to problematize some usual ways in which examiners justify their decisions. Reconstructively, I will allow this toolset to inform my ethnographic stories, in order to highlight the impact that contingency and heterogeneity exert over the outcome of cases.

I see my role in this study as that of mechanic who picks apart a complex legal machine and then reassembles it. Depending on how the pieces are put back together, the machine that comes out of this reconstruction looks very different from the original. In this study, I use sceptical arguments to disassemble asylum decisions and adopt the enactment approach that is outlined below to put these decisions back together in a different way.

In respect to the argument's intended reach, perhaps the best way to explain it is to say that the argument is both about Brazil and hopes to go beyond it. While considering how migrants and refugees are set apart, I make an effort to highlight what is particular about the practices I discuss. A consequence of this localization of my thinking is that the argument becomes dependent on its original setting. At the same time, however, I have the ambition that the study will encourage authors to adopt an enactment approach when studying other instances of border-making.

As the next section explains, by bringing arguments from the science studies field to bear upon the question of how migrants and refugees are set apart, my aim is to contribute to those studying more broadly how migration and borders are governed. This contribution lies in the conceptual vocabulary organized around the notion of enactment, which, I hope, will make readers better equipped to appreciate the role played by contingency and heterogeneity in setting the border between welcome and unwelcomed subject.

In the remainder of this chapter, I set the scene for the inquiry that follows by telling more about the question, case and method on which the ethnography is built. I begin by tracing how the distinction between migrants and refugees became contested among those studying migration and borders, which allows me to position the thesis in relation to this scholarship. I then identify some of the particularities I see in the Brazilian case, before giving a first glimpse of what an ethnography of asylum decisions done through enactment lenses looks like. I

conclude with an overview of the science studies arguments developed in each chapter. My hope is that, after reading this introduction, the reader will have a strong sense of what is to come in the next chapters and why.

The research as a contribution to the study of migration and borders

In a quote repeated in many articles that deal with the political significance of refugees, the political philosopher Giorgio Agamben notes that by 'breaking up the identity between man and citizen, between nativity and nationality, the refugee throws into crisis the original fiction of sovereignty'.⁵ As status determination is one of the policy areas in which belonging is most explicitly in question, the procedure is indeed linked to a set of passionate debates. The challenges posed by refugees to the understanding of citizenship as a legal status and to the model of states as territorially sovereign contribute to some of the liveliest among these discussions.⁶ As part of this broad scholarship on how migration is governed, authors who study asylum have been warning us that newcomers are increasingly locked in a double bind: rendered either as victims in need of protection or as a security problem to be managed.⁷ In this section, I trace how the distinction between migrants and refugees became contested in this literature.

I start from the suggestion that asylum seekers are increasingly treated as a security problem. In a way, it would be a truism to say that the work of status determination has a security dimension. As a legal procedure involved in deciding who is welcome to the state, status determination can be rendered as a security practice in a quite straightforward sense. If we think of the border of the state as a protective line, it is easy to see the eligibility officer as a security agent who is responsible not only for protecting the refugee, but also for keeping the threatening stranger outside.

As authors who study borders have been telling us for years, however, this way of conceiving the border as a protective line doesn't hold much water in the world we live in.⁸ For a Brazilian citizen, for instance, the image of a neighbour's army marching across the border sounds considerably less likely than the prospect of a drug dealer crossing the border into the Amazon. Of even greater

concern is the figure that epitomizes the outlaw in the West today: the terrorist. Which agency is responsible for catching this outlaw: the police or the military? I doubt the separation of internal and external security has ever been black and white beyond the minds of classical political theorists.⁹ Even if it was, these two spheres are nowadays so 'dis-differentiated' that it is hard to say which agency is responsible for what.¹⁰

Now, when we are comfortable in the belief that the threat waits for us at the border, it seems easy to guarantee the security of those inside. All we would have to do is to make sure that the threat lurking at the border remains outside. Things change when we come to believe that the threat is not the tank driving over barbed wire, but the drug dealer crossing the border at the airport. A new form of governing migration seems to become necessary when we see all movement across borders as a source of insecurity.¹¹

If we stick to the common-sense way of thinking about the border as a line of protection, one possibility is to bring up a fortress around the country and make sure no unwelcome figure comes in.¹² But even if this way of governing migration were not a logistic impossibility, the fortress solution would be self-defeating in a world in which a nation's wealth is measured by its capacity to attract investments, allure workers and elicit tourism.¹³

The alternative, it seems, is to govern migration in a smarter and more targeted way.¹⁴ The policy response we are left with seems to make ubiquitous the work of governing migration. In practice, this might justify collecting information about people – all the people – before, during and after they cross the border, so that we can identify risk elements and act pre-emptively.¹⁵ It might also be necessary to read civil rights 'less strictly' and to put 'selfish' concerns with privacy in second place.¹⁶ At the end of the day, governments keep telling us, all these sacrifices are required to keep us safe.

Of course, this picture is but an ironic sketch of how the scholarship on migration to which I subscribe describes the current predicament of mobility in western societies. I shall say more about this tendency to associate mobility and insecurity below. Even this brief sketch, however, already allows me to highlight the change of emphasis in the way asylum is conceived in public discourse. In place of a humanitarian concern with the protection of asylum seekers, which is

supposed to have motivated the existing protection regime, public interest in asylum is increasingly informed by a sense of unease in face of the security and socio-economic drawbacks allegedly triggered by newcomers.¹⁷

Status determination, it would seem, is no exception to this change of emphasis. The security dimension of the determination work has been gaining salience.¹⁸ Asylum screening exists to make sure that men and women in need of international protection will receive it. But it is also increasingly justified as a necessary filter that allows governments to grant status to the genuine refugee while keeping the unwelcome figure outside. Among these unwelcomed figures whom the work of status determination is expected to filter, we find the drug smuggler, the terrorist and – in spite of all arguments against lumping these together – the economic migrant. All are reduced to the figure of the bogus applicant.¹⁹

Set against this background, the question of what distinguishes refugees from other kinds of migrants comes forcefully to the fore. We can assume that, if a person is caught smuggling a bomb through a check-point, the Brazilian police will arrest this person and press charges for terrorism. Likewise, it would make sense to expect that a person caught in the airport with cocaine strapped to the body would be arrested and charged with drug smuggling. Now, what about a migrant trying to enter Brazil without a visa? How can a border authority tell whether this foreigner is an economic migrant, trying to enter Brazil irregularly, or rather a genuine refugee?

If we look at the numbers, it would seem that there must be a way of answering this question. Historically, classifying the asylum seeker as an economic migrant has been the main reason why the government has denied asylum requests in Brazil.²⁰ In 2013, the primary refusal rate in the country was above 85%.²¹ This figure shows that eligibility officers in Brazil are somehow able to set the contrast. So how can they know? How can they tell the difference between migrant and refugee?

There is a legal answer to this question. If we follow the Geneva Convention, the basis for distinguishing migrant from refugee lies in the reasons that lead the person to migrate. The convention reserves refugee status to that foreigner who

‘owing to well-founded fear of being persecuted [...] is unable or [...] unwilling to avail himself of the protection of that country’. This legal definition thus seems to answer the question by distinguishing migrants, who make a calculated decision to move, from refugees, who are forced to move to escape persecution.

Translated into the day-to-day tasks of status determination, this definition suggests that if a foreigner is asking for asylum to avoid human rights violations or escape persecution for the reasons set forth by the Geneva Convention, then that person is to be acknowledged as refugee. In turn, if a foreigner has chosen to migrate for other reasons and is asking asylum, that person would not be considered a refugee.

Forced displacement equals refugee, voluntary displacement equals migrant. The idea that migratory drives can be separated into such binary configurations is today highly contested in the migration literature.

Telling the difference between migrants and refugees

Even as a heuristic model, the idea that it is possible to arrange migration in a spectrum of choice, using voluntary and forced migration as the poles, has been charged as grossly simplifying. The motives that drive people to migrate are never black and white.²² Depending on how old migrants are, for instance, or how extensive is their support network, persons might experience events as more or less threatening.²³

Trying to organize migration in terms of forced and voluntary has also been criticized for leaving vague the reach of international protection. Authors have argued that the definition of refugee as a migrant *forced* to move can be shown to apply to a greater proportion of the migrant population than that usually accepted under the remit of the Geneva Convention.²⁴ The plight of internally displaced persons, for instance, is often mentioned in this vein.²⁵

Among those scholars who criticize attempts to distinguish refugees from migrants, the complexities involved in unravelling migratory drives and specifying the reach of protection have translated into the argument that the term ‘refugee’ is better understood as a bureaucratic label than as a social category.²⁶ The conclusion is expressed succinctly by Italian anthropologist

Giulia Scalettari in her suggestion that 'what concretely distinguishes refugees from other migrants is precisely the fact of being labelled as such. It is the refugee label itself that creates a distinction between refugees and other migrants'.²⁷

Interestingly, we find similar suggestions being made by authors who defend the idea that the refugee experience is essentially different from that of other migrants. Scholar of international law James C. Hathaway, for example, has made the point that the forced/voluntary binary doesn't explain the difference between refugees and migrants. At the same time, he seeks to retain the distinction by characterizing refugee-hood in terms of a shared legal status. 'In the real world', Hathaway claims, 'legal status – and the rights that go with various forms of legal status – routinely identify and constitute fundamental social and political categories'.²⁸

I will look more closely at the debate on whether the refugee definition is clear-cut enough to distinguish refugees from migrants in Chapter 1. I will dwell on the concept of indeterminacy and argue that, when connected with the issue of rule-following, the phenomenon places a stronger challenge to the possibility of differentiating migrants and refugees than the literature on migration and borders has considered so far. At this point, however, what I want to highlight is the change this controversy has entailed in the way the term refugee is conceived. As opposed to understanding refugee-hood as a social category, the condition of being a refugee is increasingly recognized as a legal and bureaucratic label. However convincing the existing arguments concerning the possibility of distinguishing migrants and refugees might be, this change in how the term is conceived has a crucial consequence to how we approach the topic.

To treat the term refugee as a label, as scholar of internal development Roger Zetter explains, 'is to focus on how and with what consequences people becomes labelled as refugees *within the context of public policy practices*'.²⁹ A label, in Scalettari's precise phrasing, 'does not say as much about the people to whom it refers as about the system that produced the label; therefore, *it calls policy into question*'.³⁰

The basic idea that, in order to account for how migrants and refugees are set apart, we need to bring policy into question has been finding echo in the migration literature.³¹ Over the last few years, a number of arguments have been made to that effect. In their discussion on what would be the key tasks for those concerned with the fractioning of migration figures, migration scholars Vicki Squire and Stephan Scheel have asked for 'further work diagnosing how particular figures of migration emerge and become institutionalized as categorizations of migrant groups'.³² Beyond the debate on whether the distinction between migrants and refugees is sociologically sound, evidence of good policy or is even ethically desirable, as American sociologist Adam Saltsman puts it, a consensus seems to be emerging that 'it is the process of determining refugee status which deserves scholarly scrutiny, as it reflects the transformation from laws and policies into practice'.³³

In the words of the Spanish anthropologist Olga Jubany:

Exploring the work of those implementing the rules, enforcing the laws and making frontline decisions is key to understanding the asylum screening process, but too often is hidden from the public eye and ignored by academic and political debate. [...] A sociological approach [is required] to unravel the rules regulating migration controls and asylum seekers' lives to look beyond the surface of the legal shield and the rhetorical concepts of political discourses.³⁴

By stressing that migration figures are not natural categories, these studies are helping turn the difference between migrants and refugees into an object of research. The case they make for studying the bureaucratic creation of these migration figures explains to a great extent why I have chosen to approach the work of status determination through an ethnography.

In the chapters that follow, I seek to endorse the suggestion that migrants and refugees do not represent distinguishable social groups. I attempt to heed requests for further work on how migration figures are created. At the same time, however, I also try to open up the question of how refugees are set apart from other migrants in the process of asylum application itself.

Arguments in favour of exploring the work of those applying the rules and making frontline decisions underscore the need for grounded research. But they

also retain a rather conventional understanding of what there is to decide, who takes part in this decision, and where and when the decision is made. In problematizing this underlying understanding of decision, I invite scholars interested in how migration is governed to consider the possibility that talk of decision 'as something people do' is itself invested in the bordering work.

Conceptually, my contribution lies in the vocabulary I adapt from science studies and the challenges this vocabulary poses to our understanding of decision. My hope is that the reader will leave the study not only with a stronger sense of the problems surrounding attempts to distinguish migrants and refugees, but also a fresh outlook on how this distinction is so routinely enacted.

Why Brazil?

So far, my brief review of the literature on migration and borders has served to raise the question of how the distinction between migrants and refugees is established during status determination. As the Geneva Convention doesn't prescribe a universal model for determination procedures, this question seems to require a localized research. In this section, I tell why I find the Brazilian case is a good one for tinkering with this issue. I offer a brief history of refugee protection in the country. And I isolate a few distinctive features that I believe make status determination in Brazil worth a more detailed investigation.

My interest for the Brazilian case was stirred by different kinds of reasons: some of them practical, some conceptual and others related to the political leaning I have tried to give this work. On the more practical register, the fact that I am Brazilian and the many advantages this represents for ethnography – language, contacts, familiarity with places and customs etc. – have certainly influenced my decision to take status determination in Brazil as my focal point.

There is also, I believe, a certain informality in the functioning of Brazilian bureaucracy that makes it especially amenable to ethnography. This has to do with its openness towards research, which made examiners perhaps more welcoming, or perhaps simply more indifferent, to the idea of having an academic doing some vague observation of their everyday lives. This perhaps explains why so many innovative anthropologists – from Claude Lévi-Strauss

visiting the Caduveo and Bororo tribes in Mato Grosso to Bruno Latour following biologists and soil scientists into the Amazon – have chosen Brazil as a laboratory for their ethnographic incursions.

In one of his studies, Latour makes a case for an anthropology of the moderns whose terms are, I think, still very much applicable to Brazil. Ethnographic research about Brazil has translated into excellent studies on isolated societies living deep in the Amazon forest. We have learned about the social cosmology of the Araweté people and have come to appreciate Amerindian Perspectivism. On the other hand, as Latour says, ‘relatively few attempts have been made to penetrate the intimacy of life among tribes which are much nearer at hand’.³⁵ By choosing Brazil as the setting of my stories, I have sought to benefit from the familiarity or indifference mentioned above, and also to visit the less exotic tribes living in ministry buildings and law offices in Brazilian cities.

In addition to these practical drives, the issue of status determination in Brazil also seems to me a good choice for the political relevance it has. For it offers, I believe, an opportunity to look at how the work of demarcating welcomed and unwelcomed subjects is done *in a soft way*.

What I mean by a ‘soft’ way of making borders is more easily grasped if we compare the evolution of refugee protection in Brazil to that of countries whose asylum policies are considered restrictive. In a nutshell, the implementation of refugee protection in Brazil was part of a broader campaign to restore Brazil’s image as a democratic nation following 24 years of military dictatorship (between 1964 and 1988).³⁶ In theory, Brazil had been committed to refugee protection long before this campaign. The country ratified the Refugee Convention in 1961 and signed the UN Protocol on the Status of Refugees in 1972. However, until the end of the dictatorship, these agreements existed more in theory than in practice.³⁷

This gap between legal commitments and the practice of refugee protection is exemplified by the fact that the military government denied the status of International Organization to the UNHCR office in the country. The military government didn’t grant UNHCR this status, for doing so would commit it

internally to international law.³⁸ The practical consequence of this lack of status was that UNHCR had to conduct its efforts to resettle those fleeing political persecution in the region almost as a clandestine organization.³⁹ The more visible work of dealing with asylum seekers and attending to their pastoral needs had to be taken up by charities run by the Catholic Church (Cáritas and the Justice and Peace Commission, among others). This explains in part why these organizations continue to play a key role in the procedures of refugee status determination today.⁴⁰

Until the return to democracy, Brazil was more a country of transit than one of refuge. Things started to change around the 1980s, in the period known in Brazil as 'distension' (*distensão*). Under increasing pressure from civil society, the military regime started a gradual transition back into civilian government. In 1982, the regime granted the status of International Organization to UNHCR.⁴¹ In 1984, Brazil signed the Cartagena Declaration on Refugees, extending refugee status beyond the 1951 definition to include people fleeing their countries to escape 'gross violations of human rights, foreign aggression, internal conflicts or other circumstances which threaten their lives, security or liberty'.⁴² Democratization was concluded during the second half of the 1980s, with the adoption of a new federal constitution in 1988 and the holding of elections for president in 1989.

This liberalization of refugee protection in Brazil culminated in 1997, with the promulgation of Law 9474, known as The National Refugee Act.⁴³ The Act established the procedure for refugee status determination that is followed in Brazil today, in which the Federal Police, the UNHCR, Conare, and civil society agencies like Cáritas work together to process asylum requests.⁴⁴ The Act also identifies Conare as the agency responsible for ruling on refugee status. In the following chapters, we are going to look at the refugee status determination process in detail. The point for now is that the 1997 Act is a mark in the broader effort to re-establish Brazil's image as a western liberal state.

This attempt to change the overall image of the country seems to have succeeded. The refugee population now living in Brazil remains small compared to those of the big receiving countries in the Global South. Brazil had, in 2014, a

population of 5,208 refugees,⁴⁵ which is a very modest number in comparison with the 1.6 million refugees that today live in Pakistan.⁴⁶ But this number is increasing considerably: between 2010 and 2014, the number of new refugees in Brazil has increased 1.255%.⁴⁷ And, according to the UNHCR, this figure will most likely go up.⁴⁸ This is explained in part as a consequence of Brazil being increasingly perceived around the world as a growing economy and a country of refuge; it is sometimes even touted as a model for the South American region when it comes to refugee legislation.⁴⁹

The fact that the Brazilian government presents the country as a receptive nation strikes me as an interesting contrast between the Brazilian case and hard-line countries like Australia, France, Spain, UK and the US, which are constantly admonished for their restrictive posture towards asylum. The more comprehensive definition of no-return now in effect in international law (which operates on the basis of reasonable grounds and extending to forms of indirect return) is accepted to amount in practice to a duty to admit all asylum seekers until the validity of their cases has been determined.⁵⁰ In this light, the no-entry policies adopted by these states – extra-territorial border checks, the intensification of visa requirements and, most crudely, the system of buffer states and extra-jurisdictional detention – can all be said to violate the Refugee Convention, as they deny access of potential asylum seekers to their jurisdictions.⁵¹

Much of the sociological literature on asylum seeking has focused on these hard-line countries. There is today an important body of literature that reacts critically to the tendency in the Global North to criminalize not only asylum, but most forms of migration. Authors writing in neighbouring disciplines, like criminology, security studies and surveillance studies, have brought to the fore the many ways in which this criminalization is taking place. These authors have warned us about a more ostensive rendering of asylum seekers as an existential threat for national security and social order.⁵² And they have shared their distress in face of the more perennial absorption of asylum into a continuum of insecurity, through its association with well-established sources of unease, such as terrorism and human trafficking.⁵³

To justify my interest in the Brazilian context, I could have resorted to a kind of translation exercise, by making refugee protection in Brazil look more like that of these hard line countries.⁵⁴ That – I’m sorry to say – wouldn’t be so hard to do. For if Brazil is praised as an example when it comes to legislation, it is far from exemplary when it comes to the support it actually gives to asylum seekers. I could say that the asylum process in Brazil is not as welcoming as the government would have us believe.⁵⁵ I could pass on the message that ‘Green and Yellow’ xenophobia is, in fact, on the rise.⁵⁶ I could tell you of the many indignities that asylum seekers have to endure in terms of the bureaucracy and lack of financial support, or of the many cases in which refugees had to bring their families to live in slums.⁵⁷ And I could also, as startling as it is, tell stories of refugees who asked to be sent back to humanitarian camps when they found life in Brazil to be harder than in the war-torn countries.⁵⁸

Yet there are, I think, good reasons not to make this translation the main purpose of the study. Above all, I am convinced that this attempt to emphasize the association with hard-line countries would risk importing arguments and reproducing critiques that, although absolutely necessary in their original contexts, are not transferrable to Brazil. It is time perhaps for a critique made from the Global South concerning the specificities of problems of the Global South.⁵⁹ That is why I would prefer to emphasize what is different about the Brazilian case instead of its resemblance to the northern experience. From a political point of view, attempting to create interest by emphasizing similarity would risk losing sight of what is perhaps most interesting about the Brazilian case: the opportunity to look at how a country considered ‘of refuge’ and ‘a regional example’ creates the border between welcomed and unwelcomed.

Finally, in the conceptual register, what I mean by this soft making of borders is closely related to what French philosopher Etienne Balibar calls a ‘civil’ production of difference. Balibar tell us that the emergence of the citizen as a historic figure is the product of a two pronged process: on the one hand, a violent exclusion, achieved mainly through what he calls a ‘quasi-military enforcement of borders’, and, on the other hand, a “civil process” of elaboration of differences’.⁶⁰ Increasingly, Balibar tells us, it is the combination

of security borders and these '*mere administrative separations*' that 'recreates the figure of the stranger as political enemy'.⁶¹

Citizenship theorist Engin Isin makes a similar point in his *Being Political*, when he argues that political thought in the West has focused too much on the alienating relation between friend and foe. Isin considers unproductive this disproportional emphasis on the friend and foe dialectic. He defends a relational image of how the concepts of citizen and outsider are defined, inspired by an understanding of language as a system in which significance is attributed to arbitrarily chosen signifiers through contrast. For Isin, this focus on the alienation between friend and enemy is limiting because it directs our attention precisely towards the dynamic in which the citizen and its outsider interact the least. This is, for him, perhaps the least political of all possible relational strategies for the formation of identity, as there is little exchange and, therefore, little possibility of establishing significance through relational contrast. Instead of looking to the relation between the citizen and its distant outsiders, Isin proposes that we look more carefully to the relation between the citizen and its 'immanent others'.⁶²

The case of status determination in Brazil offers, I believe, a good opportunity to look at this more immanent way of making borders. Much of the literature on asylum has been concerned with these more violent forms of alienation, with many works being written on topics like detention, expulsion and deportation.⁶³ In contrast, not so much has been said about the not so harsh, 'almost civil' administrative work in which the difference between the welcomed and the unwelcomed is established. This is another specificity of the Brazilian case that makes it both conceptually and politically interesting.

As the sociologist Zygmunt Bauman and Balibar remind us, 'all societies produce strangers; but each kind of society produces its own kind of strangers, and produces them in its own inimitable way'.⁶⁴ In this study I take the process of refugee status determination as an example of how the welcoming, happy, receptive country that Brazil is said to be establishes the difference between welcomed and unwelcomed subjects *in its own inimitable way*.

Research strategy

In asking how migrants and refugees are distinguished in practice, I am consciously avoiding an abstract reflection on the political significance of refugees. Instead, following the advice of Malaysian anthropologist Aihwa Ong, I seek to trade on specificity.

When discussing the encounter between newly arrived refugees and the American state in *Buddha is hiding*, Ong criticizes authors who treat the relation between the state and the refugee as one of linear exclusion, as if the state would always seek to exclude refugees in order to reinforce its prerogative to dictate what life is worth living.⁶⁵ Against this black and white image, Ong argues that, if we look more closely to the encounters refugees have with state agencies, what we see is that these agencies do not necessarily treat refugees as complete outsiders to the norms of the host country. Instead of this absolute exclusion, Ong shows us that the different agencies involved with the assimilation of refugees in the United States operate with *particular norms* of what it is to be a good citizen and adopt *particular practices* to try to mould the refugee's behaviour according to these norms.

For Ong, these nuances in the treatment of refugees 'cannot be revealed by a study of formal laws or by relying on a notion of citizenship as something that is simply possessed (like a passport)'.⁶⁶ Rather, for her, these specificities have to be highlighted 'through an ethnographic investigation of the political reasonings and practices that assess groups differently and assign them different fates'. Like Ong, I am interested in difference and nuances. As Ong, I am convinced that the particularities of determination practices are better grasped through an ethnographic investigation of asylum seeking.

Mine, of course, is not the first attempt to conduct an ethnographic study of asylum procedures. Although the number of publications is still small, country-specific studies have been gaining traction, giving rise to timely questions concerning the involvement of medical doctors and social scientists with border control in countries like Canada,⁶⁷ Denmark,⁶⁸ France,⁶⁹ Spain⁷⁰ and the UK.⁷¹ Also, in Brazil, studies exploring the work of 'managing and governing' exerted

by state bureaucracy are gaining space in international relations and anthropology departments.⁷²

Many of these works are outstanding and it is not my intention to prove them wrong in any way. If I see a difference in how I seek to approach status determination, it has to do more with the adoption of what I have been calling an 'enactment approach', and the change of focus that comes with it, than with a *correction* of the existing accounts.

To put it as directly as possible, what I see as particular about the way I seek to study status determination is not the ethnographic approach alone. The contribution I seek to make lies in the conceptual apparatus of enactment, which I adapt to generate my ethnographic account.

In science studies, the notion of enactment has been used as a covering term for a set of methodological principles. First among these, to study cases with an enactment approach involves avoiding reference to intrinsic qualities when accounting for the request's outcome. For example, to say that a case was dismissed as weak 'because it clearly lacked legal fit' is not acceptable in this approach.

Accounts that point to intrinsic qualities are considered to have a 'black-boxing effect', to borrow Latour's term. Like a technology that works too well, the more evident the decision is deemed to be, the more obscure its internal functioning becomes.⁷³ Black boxing accounts of this kind are eschewed in favour of what is described in science studies as a 'symmetric take'; the same kind of factors that would be explored to account for the case's outcome had it been considered controversial must be taken into consideration when the decision is consensual and straightforward.⁷⁴

A second enactment principle consists of extending symmetry to the kinds of factors that must be taken into consideration. When accounting for why a case came to emerge as weak, for example, it is not enough to make reference to the examiner's 'social position' and 'social background'. This would be to presume that only *social* factors have impact. In an enactment approach, enacting refugees is treated as a material practice as much as a social one. The way a police officer asks questions is treated as a relevant aspect of why the case is

dismissed, for example, but the impact exerted by a broken scanner or a fading photograph is taken in consideration too.⁷⁵

Finally, adopting an enactment approach means to pay attention to how different enactments of a case are arranged in relation to each other. So, for example, instead of presuming that a negative decision is consensual because ‘all examiners are looking at the same weak case’, an enactment approach demands us to check how this consensual assessment is maintained in practice. Maybe questions that would have led the case to emerge in a different shape were never asked. Perhaps arranging the interviews in a certain order contributed to keeping this alternative enactment out of sight. Studying status determination with an enactment approach involves being attentive to the impact exerted over decisions by little ‘coordinating’ arrangements like these.⁷⁶

I hope that adopting this enactment toolset will allow those studying migration and borders to develop a sensibility for how contingency and heterogeneity impact the outcome of asylum requests. In contrast with the declaratory model, which speaks of the difference between migrant and refugee as something people decide at some point, this enactment approach highlights how this border is brought about in a decentred way.

I justify my adoption of this enactment approach in a series of arguments that run through the study. In each of my chapters, I develop one aspect of the enactment toolbox to illustrate the difference it makes in how we see the procedure. In the remainder of this chapter, I want to discuss some questions about method and give a first glimpse of what an ethnography of asylum decisions seen through enactment lenses looks like.

Reflections on fieldwork in Brazil

Not all authors who publish under the rubric of science studies think alike, of course. But for most of the names you will find below, the saying ‘translation is betrayal’ works a bit like a motto. The basic message is simple. No matter how hard a scientist tries to copy a particular laboratory elsewhere, something will

change during the process of copying. Some things are carried on and translated into the new setting. Others are left behind, betrayed.⁷⁷

The same motto, I want to say, applies to ethnographic accounts. In the ethnographic stories that follow, I try to stay close to the words I heard and to the things I saw in Brazil. It shouldn't be forgotten, however, that it was me doing the hearing and me doing the looking. My views on what matters came into play, which means that parts of these practices were considered in this study while others were left out. It would be a mistake to approach the ethnography as a mirroring report. It is inescapably partial in that sense.

Although none of this should be surprising, I believe there are good reasons to underscore it. If kept in mind, the motto invites me to reflect on the betrayals effected by my own writing.

Sometimes, when we read academic narratives, we get the feeling that the author is not there. The styles with which reports are written are meant to encourage the impression that the narrative is writing itself.⁷⁸ That, as you will see, is not how I have chosen to proceed. Instead of keeping the pretence that I am the good and neutral scientist, a ghost-writer of nature, or the modest witness, as cultural theorist Donna Haraway describes it, I choose to be open about my presence in the stories I tell.⁷⁹ Instead of hiding them in the background, I bring the challenges and disconcertments I experienced to the front stage.

Among these challenges is one issue that is central for an ethnography that follows objects and people around, although it usually remains hidden. It is the issue of how much 'stuff' I should hope to include. While in Brazil, basically without realizing it, I saw myself involved in what is described in current anthropological jargon as a 'multi-sited' ethnography. Considering in retrospect what is entailed by this way of researching, I came to learn that, if left loose, talk of multi-sited ethnography risks inviting some problematic connotations.⁸⁰

Matei Candea, the social anthropologist, has noted that to talk of an ethnography as multi-sited invokes a certain aura of holism. It encourages the perception that the research can somehow 'cover it all'. Perhaps more damaging

is the fact that, when we think of research as multi-sited, we risk forgetting that each site is multiple in itself.⁸¹

Following Candea's advice, I want to warn the reader that my account of status determination in Brazil is not only incomplete, as it doesn't aspire to be complete. While writing it, I have sought to give a sense of the path that asylum cases usually follow. I also, however, left a lot of other practices unmentioned. And the same is true for each practice I describe. Each determination practice is multiple in itself. The way I unpack them gives a sense of what I found important, but also leaves a lot out of sight. Instead of as self-enclosed reports on self-enclosed events, I like to think of my snapshots as 'windows into complexity', to borrow Candea's expression.⁸²

As I betray aspects of the practices I talk about, I also betray my informants. Often kept out of sight in final reports is the author's role in establishing the balance between ethnographic voices. Here, again, I think it is better to be open about my role in establishing this balance than to keep the pretence that my informants are somehow speaking for themselves.

A more technical aspect of this betrayal has to do with the selection I effect between those aspects of my informants' speech to which I choose to attend. In many of the stories that follow, I comment on exchanges between asylum seekers and case examiners and talk about conversations we had. As these asylum seekers can be harmed if identified, most of these conversations couldn't be recorded. A consequence of this is that much of their emotions ended up being betrayed. Even though I tried to attend to pauses and tones while writing my account, my snapshots leave out much of the phonetic movements and conversation breaks that would be required were I to try a formal conversation analysis.

Perhaps more relevant, when selecting what conversations to report, I also expose myself to the charges of intellectual vassalage, as sociologist of science Michael Mulkay once called it. I impose my own 'cut' over my informants and build a partial bricolage of our conversations.⁸³ Here, again, all I can do is plead guilty and tell the reader my reasons.

So I can better justify myself, allow me a geographical metaphor. If cartographers were to try and be '100% faithful' to what they see – if we grant such a thing is even possible – they would need maps as big as the countries themselves.⁸⁴ So they make maps smaller, simpler and with more or less detail. They craft the maps according to the practical purpose at hand. This is a way of thinking about the purpose of descriptions that is a lot different from a comparison in terms of empirical accuracy. Instead of how correct, right, true to reality it is deemed to be, what makes a map good or bad in this way of thinking is how productive it is *given the task at hand*.

I prefer to think of the relation between this account and other accounts in these terms. I have studied my informants' comments not so much for their value as descriptions of reality. Instead, I have selected those remarks that allow me to highlight their role as discursive devices: as ways of talking and reasoning that contribute to making the bordering of migrants and refugees possible.

Again, I hasten to add that all this should sound self-evident. Yet, among authors who study the work of controlling borders and governing migration, calls for research sometimes sound rather positive in their empiricism. Turns to practice and ethnography are justified as sources of 'better descriptions' of what agents 'actually do'.

To be clear, the study is pitched as a polemic *against* the declaratory picture of asylum decisions. The arguments I make are meant to support the conclusion that the understanding of decision implicit in the declaratory picture should be dropped in favour of an enactment one. So comparing the merits of alternative descriptions is a central aspect of what the study sets out to do.

The criterion I use for merit, however, is not fidelity to reality. I do not claim that my description of status determination should be favoured because it has more empirical support (in fact, questioning the use of empirical support as an arbiter to choose between theories is one of the arguments the study develops). If my account is to be favoured, it is rather because it helps to problematize rather entrenched assumptions about how the border between migrant and refugee emerges. Crucially, if my account is to be favoured, it is because it invites migration scholars to consider more carefully the possibility that our way of

speaking about decision 'as something examiners do' is part of the bordering work as well.

To be so explicit about the political leaning of an ethnographic narrative would seem to violate the standard methodological stricture of non-involvement. One could see my comments so far as a sign that I have overstepped the fine line between participating and crossing over.

As a reply to this charge, perhaps the best answer is one adopted by British sociologist of science John Law. 'We all go native', Law tells us, whether we realize it or not.⁸⁵ We all become cogs in the networks we study. The real question is not whether to get involved, but what effect we might want to have. On the other hand, as Law adds, to be open about our preferences is not the same as being uncritical.⁸⁶

Following Law's advice, I think the best I can do is to let the reader assess the extent to which my personal preferences have added to or impoverished the account.

What does it look like?

In this study, I constantly stitch conceptual arguments to a series of stories that I experienced during my time in Brazil. During the four years I worked on this thesis, I took an internship position in one of the legal agencies responsible for guiding asylum seekers through the maze of status determination. I followed asylum seekers in their encounters with the Brazilian Federal Police, in meetings with lawyers and case owners and in trajectories that took me through multiple sites: from Rio de Janeiro to São Paulo, from São Paulo to Brasília and back again. I watched while men and women from all over the world – old and young, Angolans, Colombians, Syrians, Afghans – inscribed their lives on forms and handed in fading documents. I listened while they told their stories, sometimes in Spanish and Swahili, sometimes in French or in English, sometimes over laughter and sometimes amid tears. I observed while lawyers opened new files, filled them with notes and emitted their initial judgments after being more or less persuaded by the applicants' reports. And, after a long and

hard negotiation, I also gained access to a beautiful arched building designed by Oscar Niemeyer in Brasília, where Conare members reopen those files and emit *final rulings* about people's lives.

And what did I see while following asylum seekers through society? I found an equally heterogeneous array of applicants and documents, poorly printed forms, lawyers and case owners, national treaties, old computers, yellow folders, fading stamps, interpreters, human rights records, ministerial representatives, oral accounts, cold meeting rooms and, sometimes, colder police officers, all coming together to enact or deny the refugee status of asylum seekers.

To be sure, for the sake of full disclosure, I went out looking at these practices already convinced that the definition of whether the asylum seeker is a migrant or refugee cannot be traced back to a single and isolated event – a sovereign decision by a petty sovereign.⁸⁷ Instead, I assumed this distinction to be the effect of heterogeneous and decentred practices, in which a striking range of people and things are somehow mingled together, thereby allowing an official ruling to emerge.

The French philosopher and anthropologist Bruno Latour argues that this elusive thing we call 'the essence of law' lies not in a definition 'but in a practice, a situated, material practice that ties a whole range of heterogeneous phenomena *in a certain specific way*'.⁸⁸ The challenge, Latour tell us, is in unravelling the particular way in which such heterogeneous elements are brought together to make a legal decision possible.

Following Latour's advice, I sought in this study to bring into focus the totally specific ways in which the different practices involved in examining requests – and all the heterogeneous elements that come with them – are brought together during status determination in Brazil. Little by little, my desire to understand how an asylum seeker succeeds or fails in achieving the refugee reality translated into an effort to look at how subjects and objects are stitched together, to create the kind of coherent and credible case that examiners are looking for.

Here is what I found.

A breakdown

The ethnography adopts the old fashioned rhetorical format of a travel journey. It opens at the first encounters between asylum seekers and the Brazilian authorities in Cáritas. It closes at the governmental meeting in the capital, Brasília, when cases are brought to a vote and official rulings are published. The conceptual argument is arranged as a reflection on what I believe are five defining aspects of the declaratory picture of asylum decisions.

Chapter 1, *Following the Law*, develops a thought experiment to encourage scepticism about the use of legal support as a justification for denial. It considers arguments made in the scholarly literature on migration concerning the legal basis for distinguishing migrants and refugees and it connects these to the discussion in the science studies field concerning the notion of rule-following. The chapter argues that attempts to justify the demarcation of migrant and refugee are stricken by a stronger form of indeterminacy than the scholarly debate on migration has considered so far.

Chapter 2, *Gathering Evidence*, adds a further layer to the sceptical case by disputing justifications for decisions that rely on the measurement of empirical support. The chapter puts forward a case for a symmetrical approach to asylum decisions. It connects snapshots on controversies in the assessment of asylum requests to arguments developed in science studies concerning empirical under-determination and regress. The goal is to highlight a proclivity in examiners' speech to shift registers when justifying decisions with which they agree and decisions they dispute.

Chapter 3, *Declaring Strength*, gives an ontological spin to the arguments developed in Chapters 1 and 2. It tells stories to illustrate the impact that contingency and heterogeneity have over the outcome of requests. It dwells on the implications of the sceptical problems of strong indeterminacy and regress to the understanding of asylum decisions as declaratory. The chapter spells out the argument that what counts as the case's anterior reality is enacted in the determination practices and not disclosed in them.

Chapter 4, Judging Consistency, takes the narrative to São Paulo and Brasília to discuss how an enactment approach changes the way we see the relation between determination practices. Taking issue with the use of consistency as an indicator of credibility, the chapter makes a case for attending to how different enactments of a case are practically coordinated. It ties these arguments to stories about inconsistencies in asylum requests to illustrate how coordination might make alternative ways of enacting a case hard to see and thus steer a request towards denial.

Chapter 5, Making Decisions, closes the ethnography. It brings the narrative into the headquarters of the Brazilian National Committee for Refugees, where asylum requests are ruled upon. The chapter establishes a parallel between the discussion on the discretionary nature of asylum decisions and the discussion on science studies concerning the notion of phase-work. The chapter shows how talk of decision as 'something examiners do' is turned into a rhetoric device to shut down the possibility for dissent and effect practical closure.

Finally, Chapter 6, Enacting Refugees, goes back to the conclusions derived from the previous chapters and arranges them around the themes of scepticism, enactment and decentring. An enactment approach, the conclusion suggests, does not only enrich our understanding of how the border between migrants and refugees is built. It also makes us more aware of how our habit of talking about decisions as something that examiners do is itself invested in the enactment of this border.



[Picture 1 - Arriving at Cáritas]

Following the Law

Arriving at Cáritas for the first time, a woman crosses the bricked corridor between the gate and the reception desk. She is carrying a child, a girl. Cáritas's receptionist listens while she tells her story, mingling words in French and Portuguese as she goes along. Stuttering, the woman says she was born in Kinshasa, DR Congo. Recently arrived in Rio, she speaks mainly Lingala, the regional idiom of the Congo River's bend. Communication proves difficult, so I decide to intervene. I learned a few days earlier that Lingala was deeply influenced by Belgian colonizers and that Lingala and French speakers usually manage to communicate. I walk to the woman and ask if she would be ok repeating her story in French. She nods and goes over her story again.

'We are fleeing the war' she says. 'Rebels attacked my village in North Kivu. I lost my father and my husband, and I had nowhere to go. A priest got me a place in a boat and I arrived here.'

After querying her about her child, I ask the receptionist for a French version of the official Questionnaire for Asylum Request. The receptionist gives the woman a pen and a pad, and I advise her to fill in the form as precisely as she can. Besides personal details, the form asks questions like 'How did you enter Brazil?', 'Have you been granted asylum somewhere else before?' and 'What made you leave your country of origin?' I explain that the answers she will give to these questions will be later checked to decide on her refugee status. I help with some awkward phrasings, the result of a hasty translation from Portuguese. And the woman starts to write, in French, taking her time. When all the answers are in place, she hands the form back to the receptionist, who makes copies of it with the help of an old Xerox machine. A cover letter is stapled to the form and both documents are handed back to the woman, to be delivered to the police unit where she will file her case. Final words are exchanged – 'Thank you, good bye, good luck'. She takes her daughter's hand, and she goes away.

When she walks back in the street, this woman is not yet an asylum seeker before Brazilian law, but she is no longer an invisible alien, either. Her story has now been inscribed in an asylum request questionnaire. Her reality as a refugee, although yet very fragile, has been mentioned for the first time in the cover letter sent to the immigration police. And, although it is not yet entitled to a folder in

the open case's archive, her form now merits a place in the 'potential asylum seekers' pile, which grows at Cáritas's crammed entry hall. This woman, who was up to that point virtually invisible to the Brazilian state, has now a slightly more visible reality as a potential refugee. The work of deciding on her refugee status has begun.



[Picture 2 - Cáritas's Entry Hall and Archive]

Some months and a lot of bureaucracy later, status determination comes to an end.

The fax machine blips. Cáritas's receptionist adds paper to the drum. Another blip and the machine starts to print. An A4 sheet ends up sitting in the printer's tray. The receptionist brings the page to the office, where Cáritas's lawyer is typing at her laptop. 'Thanks', the lawyer says, her eyes still fixed on the screen.

The letter does not bring good news:

*Process SR/DPF/DF
Claimant: Mrs A*

Announcement

I herewith announce for all due purposes that the National Committee for Refugees – Conare, in its Plenary Meeting realized at 19 April 2012, decided to reject your request for the recognition of the refugee status, given it was not proven the existence of a well-founded fear of persecution compatible with the eligibility criteria fixed by art. 1º from Law 9.474, from 22 July 1997.

*General Coordinator
Conare*

This is an unhappy ending. After months of deliberation, Conare has ruled that Mrs A is not a refugee. Her asylum request has been denied. Her name has been marked in an official letter announcing that she and her daughter will not be brought under refugee protection. She may appeal, if there is room for appeal. But, as for most cases, having her name printed in this header means she is faced by the proverbial choice between the rock and the hard place – irregularity or deportation.

Cáritas's lawyer gives the letter a quick look. One could expect an outburst, but the work has to go on. There are more cases to examine and more claimants to interview. The lawyer hands the letter back to the receptionist and asks, 'Can you tell Mrs A to come down to the office, please? I need to tell her that her asylum request was denied'.

This is a serious decision to take, to deny asylum. It cannot be made lightly. In a very concrete sense, the life and freedom of the applicant might be at stake. At the very least, it can halt someone's hopes of a better life. So, in face of such an important judgment, it is only natural to ask: *how, after all, is it decided?*

When foreigners enter Cáritas's office in Rio de Janeiro and fill out asylum request questionnaires, a range of practices is put in motion to decide whether their claims for refugee reality are warranted. The process of status determination has a start. The end comes six or more months later, when asylum seekers sit in the chair facing Cáritas's lawyer and are informed that their claims have been accepted or denied. Statement and decision are the two poles of our narrative. But how is the difference between those who deserve and don't deserve refugee protection established in the meantime?

A declaratory picture

[From a procedural handbook used in Cáritas:] In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.⁸⁹

The procedural handbook mentions law, evidence and credibility when accounting for how cases are decided. Examiners are expected to disclose the asylum seekers pre-existing reality as a migrant or as an asylum seeker by following a sequence of steps, which are designed to assess the case's internal consistency, legal fit and empirical support. At the pinnacle of the determination work, decision makers are expected to bring together the evidence and legal opinions produced during these steps and rule on the claim. The distinction between migrant and refugee is linked to this moment, when Conare members come together in Brasilia and decide.

Refugee status determination means an examination by a government authority or UNHCR of whether an individual who has submitted an asylum application or otherwise expressed his or her need for international protection is indeed a refugee – that is, whether his or her situation meets the criteria specified in the applicable refugee definition. A person does not become a refugee by virtue of a recognition decision by the host country or UNHCR, but is recognized because he or she is a refugee. In other words, the recognition decision is declaratory: it acknowledges and formally confirms that the individual concerned is a refugee.⁹⁰

Follow the rule, gather evidence, judge consistency, assess strength and decide. I hope to show in this study that this way of accounting for asylum decisions is misleading in all aspects. Breaking away from this declaratory account, which talks of deciding subjects making decisions at a pivotal event, I will argue that the demarcation of migrant and refugee is enacted in a decentred way. I contend that a case's weakness doesn't emanate from the case, no matter how evident an assessment might seem. Understanding how migrants and refugees are set apart requires us to study the social and material array in which the case emerges. This, I argue, applies not only when the decision becomes contested, but also when the case is deemed to be straightforward.

1. The decision is arrived at by contrasting the case to the refugee definition and following refugee law;
2. The decision is arrived at by assessing whether the case is supported by the evidence available;
3. The decision is arrived at by assessing if the case is consistent;
4. The decision is declaratory. If free from error, the determination procedure discloses the case's strength;
5. The difference between migrant and refugee is set at the end, when decision makers sit together and rule on the request.

This list is a breakdown of the declaratory picture I have drawn out from practitioners' remarks and procedural handbooks. I will take it as a contrast to develop my account. This chapter opens up the inquiry by dwelling on the first item on this list: the suggestion that 'refugee status determination consists in assessing whether an asylum seeker's case meets the refugee definition'.

Following the law: the very act

If they are to do their work well, examiners are expected to obey the refugee definition established in the 1951 Geneva Convention, in its 1967 Protocol and in the regional agreements assimilated in Brazilian law. The resulting refugee definition is given by the National Refugee Act. It adopts the definition fixed by the Geneva Convention and expands on it to include migration triggered by human rights violations. Refugees are defined in Brazil as all individuals who:

- I – due to well-founded fear of persecution motivated by race, religion, nationality, belonging to a social group or political opinion find themselves outside their country of nationality and cannot or choose not to avail themselves of the protection of such State;
- II – lacking nationality and being outside their country of usual residence, cannot or choose not to return to their country, due to the reasons mentioned in the previous clause;
- III – due to severe and generalized human rights violations, are forced to leave their country of nationality and seek asylum in another country.⁹¹

For the non-specialist, a bullet point definition like this might make it seem as if deciding on asylum requests were a fairly cut-and-dry process. The law offers a clear list of the experiences a person has to go through to be declared a refugee. On top of this, examiners also work according to guidelines and clarification notes published by Conare and the United Nations, which define the standard of proof and establish how vague expressions are to be read and how special cases ought to be dealt with. In face of all these rules, it would make sense to assume that examiners can decide by considering whether a case meets the refugee definition. But does the refugee law determinate the outcome of a request like Mrs A's? Can the refugee definition settle the difference between migrant and refugee?

Faced with this question, a first possibility would be to answer in the affirmative and insist that the refugee law is determinate enough to settle asylum decisions (affirmative version). A second possibility would be to attenuate this

answer and acknowledge that, although the law is certainly clear-cut enough for the majority of cases, there is some degree of flexibility in it that makes cases indeterminate *sometimes* (weak indeterminacy version). Finally, a strong answer in the negative would consist in saying that there is something about the work of status determination that makes asylum decisions legally indeterminate *all the time* (strong indeterminacy version).⁹²

The suggestion I put forward in this chapter is that the work of status determination is indeterminate all the time. I try to show that, whatever decision is taken for a case, it can be shown to be in agreement with the law. This, I suggest, undermines attempts to justify denial by saying that a case lacks legal fit.

According to the letter sent to Cáritas, Mrs A's request was denied because 'it was not proven the existence of well-founded fear of persecution *compatible the eligibility criteria fixed by art. 1, Law 9474*'. To put forward the indeterminacy thesis is to question the validity of a justification like this.

To say that asylum decisions are legally indeterminate is to say that refugee law (which includes not only the National Refugee Act but all other clarification notes and procedural guidelines) is not determinate enough to define whether a particular asylum seeker is a migrant or a refugee. 'A legal conclusion is indeterminate if the materials of legal analysis [...] are insufficient to resolve the question, "Is this proposition or its denial a correct statement of the law?"'⁹³ In the next sections, I take this first definition as a starting point to contrast the weak and strong versions of the indeterminacy thesis.

The argument will move as a pendulum, swinging back and forth the idea that refugee law is determinate enough to distinguish refugees from other migrants. The next section opens with two stories I experienced in Brazil: the cases of Mr B and Mrs C. In a first step away from the declaratory picture, I discuss how these two stories challenge the idea that decisions on asylum requests can be arrived at by submitting the case to law. I dwell on what causes indeterminacy in these two cases and discuss how consequential examples of indeterminacy like these are to the work of status determination.

These two examples, I suggest, illustrate a weak sense in which the work of status determination can be said to be indeterminate. In what concerns its

source, the kind of indeterminacy that these two examples illustrate is linked to the 'open texture' of the language with which the refugee definition is written. Concerning its reach, what makes this first kind of indeterminacy weak is the fact that it restricts the phenomenon of indeterminacy to hard cases. This brings the pendulum close again to the idea that asylum decisions (at least in the majority of easy cases) are indeed legally determinate.

Having characterized the stories of Mr B and Mrs C as examples of a weak form of indeterminacy, I move next to discuss the second and stronger version of the phenomenon, which I find more consequential to the determination work. While the weak form of indeterminacy has to do with difficulties related to defining a refugee, the strong version I discuss has to do with the notion of rule-following.

Conceptually, the chapter will seek to establish a dialogue between the debate on forced migration concerning the value of the migrant/refugee distinction and arguments developed in science studies concerning the notion of rule-following. This allows me to distinguish the strong form of indeterminacy, which I seek to highlight, from the weaker version, which is more familiar to the forced migration literature.

The open texture of refugee law

Case #3: Mr B, 33 years old, citizen of Angola, asking asylum to avoid political persecution. Location: A Cáritas meeting room. Starting the eligibility hearing, Cáritas's lawyer asks why Mr B left Angola and came to Brazil. 'Soldiers invaded my villa and took me and my brother when we were young. I lived as a soldier', Mr B says. Cáritas's lawyer asks about his life as a soldier and Mr B hesitates. The stories he tells are not easy to hear. He claims his brother and he were forced to commit crimes: murders, forced recruitment, rape. Mr B insists that he had no choice, however. 'It was do or die!' he says.

Case #4: Mrs C, citizen of the Ivory Coast, asking for asylum to avoid political persecution. Location: Annex II, Justice Ministry building, Brasília. Conare members are gathered in the capital to discuss Mrs C's request. Representing the Ministry of Foreign Affairs, a diplomat argues for denial. According to him, the situation in Ivory Coast was alarming until 2011, but now, after a cease-fire, the country is safe. He claims that Mrs C's fear of political persecution 'is not well-founded'.

Representing civil society, a Cáritas lawyer reacts and defends a positive recommendation. She rejects the diplomat's suggestion that Mrs C's fear of persecution is not well-founded and dismisses as irrelevant his mention of a cease-fire. She points out that Mrs C was subjected to torture and witnessed murders. Whether the country is safe or not is not the point, the lawyer claims. What matters is that Mrs C 'is genuinely afraid'.

Contrasted to the image of examiners submitting case to law, stories like these prove disconcerting. For all the criteria and guidelines examiners have at their disposal, cases such as these seem to indicate that the refugee law cannot fully constrain how requests are decided.

The declaratory account of the process indicates that examiners do not define whether the asylum seeker is a migrant or a refugee. Rather, asylum rulings are expected to declare a refugee status that the migrant already has.

Cases like Mr B and Mrs C destabilize this image. They remind us that, at least in some cases, this declaratory way of accounting for asylum decisions does not hold. Examiners can be equally well informed about the country of origin and well versed in refugee law and still disagree on which outcome is the right legal answer for the case.

British philosopher of law H.L.A Hart coined the term 'open texture' to speak of situations like these. As any form of linguistic exchange, laws are built using general terms. This, Hart noticed, opens law to language-related sources of indeterminacy, like vagueness and ambiguity. Hart considered this kind of indeterminacy to be a general feature of human language. 'Uncertainty at the borderline [between different readings of a term or of a set of rules] is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.'⁹⁴

The kind of indeterminacy illustrated by Mr B and Mrs C's cases seems to fit well this uncertainty that Hart attributes to the 'open texture' of language. When considering how to decide on Mr B and Mrs C's requests, examiners seem to be confronted with this sort uncertainty in at least two ways: in Mr B's case, when the refugee regime embraces rules that point the determination process into conflicting directions; and, in Mrs C's case, when a particular term in the refugee definition proves vague.

Indeterminacy in the Forced Migration Literature

As in the cases of Mr B and Mrs C, the current controversy in the forced migration literature concerning the distinction between migrants and refugees can also be described as an example of the kind of 'openness' anticipated by Hart.

Oliver Bakewell, Giulia Scaletari and Nicholas Van Hear, among other authors who criticize the distinction, have suggested that 'definitions of categories of people (such as "refugees", "migrants" [...]) are not necessarily *meaningful* in the academic field'.⁹⁵ On the other hand, scholars of international refugee law, like Guy Goodwin-Gill and James C. Hathaway, insist that the term 'refugee' defines a distinctive social group: refugees are 'by definition both seriously at risk and fundamentally disfranchised', as they are 'within the unconditional protective competence of the international community'.⁹⁶

Among the critics, three main arguments have been developed to attack the distinction between migrants and refugees.⁹⁷ The first line can be described as historic. It consists in bringing the distinction into question by showing that it was motivated by policy instead of humanitarian needs. The distinction is put into question in this first line for being the outcome of bureaucratic disputes – among the post-war United States government and the United Nations, for instance – and for having its origin not in protection but in management concerns.⁹⁸

A second critique directed to the migrant/refugee distinction is normative, taking the form of either policy-normative or research-normative arguments. Research-normative arguments criticize the distinction for hindering the study of migration-related phenomena. The gist of the critique is that, when it comes to studying migration-related topics, like diaspora, repatriation and culturally driven migration, treating refugees as different from migrants gets in the way of a better understanding. Empirical studies are invoked as a source of authority to substantiate the claim.⁹⁹

Policy-normative critiques adopt a similar reasoning, but dispute the distinction by emphasizing its negative consequences for policy. The basic insight is that policy makers should not insist on the distinction because it hinders their ability to protect the broader category of 'displaced people'. The basic argument is that refugees have the same human rights needs as other migrants and that policy would be more efficient if it centred on protecting these needs.¹⁰⁰

Finally, a third line of critique that has been directed against the refugee/migrant distinction can be described as analytic. Closely intertwined with normative critiques, this argument charges the distinction with being built on problematic sociological assumptions. Research-normative arguments note that the distinction between migrant and refugee is bad for research. The reasoning in this analytical line of critique is slightly different from the normative line. It maintains that the distinction *is* bad research. This claim has been made in two main ways. The first is to say that the distinction between refugees and migrants is poor research because it inherits a bias from the study of international relations, thus favouring state-centrism and sedentarism and treating mobility as pathologic.¹⁰¹ The second and more recurrent analytic critique sets its target on the 'voluntary x forced' binary in which the distinction between migrants and refugees is often based.¹⁰²

This last line of critique is perhaps the most common attack made against the migrant/refugee binary. Much of the policy discussion works under the assumption - as UNHRC states - that 'migrants are fundamentally different from refugees' because 'migrants, especially economic migrants, choose to move in order to improve their lives', while 'refugees are forced to flee to save their lives or preserve their freedom'.¹⁰³

Authors that adopt this line of critique challenge any clear-cut demarcation between forced and voluntary movement. This argument has been developed both through conceptual arguments about agency and through empirical research. The basic claim is the obvious but often overlooked fact that decisions to migrate always involve both choice and compulsion.¹⁰⁴

Moving now to those authors who defend the contrast, James C. Hathaway offers what is perhaps the most detailed reply to the critiques outlined above.¹⁰⁵ The crux of Hathaway's argument is his attempt to circumvent analytic critiques and justify the migrant/refugee distinction on new grounds. Hathaway reacts to these critiques by acknowledging their potential merit while at the same time dismissing them for being focused on the wrong target. Hathaway agrees that persecution and state inability are not distinctive enough features to set refugees apart from other migrant categories. Although it is often assumed that these are the two features that distinguish the refugee condition from the migrant condition, he claims that this is a mistake. Nevertheless, Hathaway insists that there are at two other features that distinguish refugees from other migrant categories.

The first of these features is what Hathaway calls 'double deservingness' or 'double merit'. Hathaway argues that refugees are different not only because they are forced to migrate (merit 1), but also because they are forced to migrate due to fundamental disfranchisement within the home community (merit 2). In other words, what distinguishes refugees from migrants is that the human rights violations they endure involve denial of rights ('disfranchisement'). Hathaway explains that the operative notion in this argument is discrimination. 'A citizen 1 has access to a right [R]. Citizen 2 is denied right [R] by dint of, say, her religious preference.' Following Hathaway's double rule of refugeehood, citizen 2 would count as a refugee, as she meets the two merits of persecution and social disfranchisement.

Hathaway anticipates that it would be possible to challenge the use of double merit as a distinctive feature of refugeehood by showing that groups of forced migrants also fulfil this requirement. To foreclose this objection, he invokes the notion of unqualified access. Hathaway claims that, besides double merit, a second feature that differentiates refugees from migrants is that refugees are under the 'protection-reach' of the international community (outside their state of birth or usual residence). As he puts it, 'Refugee status defines a class of persons to whom the international community can, as a matter of practicality, undertake to provide an unconditional response'.¹⁰⁶

Hathaway leaves behind the commonly invoked features of forced mobility and protection failure but immediately replaces them with two new features that he claims set refugee and migrants apart. He argues that the combination of double merit and unquestioned access gives us a 'sound principle not to lump refugees with all forced migrants'.¹⁰⁷

Mr B's case can be read as an example of ambiguity in refugee law triggered by a difference in emphasis. Considering the grounds for denial, the Brazilian Refugee Act determines that 'individuals who committed crimes against peace, war crimes, or other heinous crimes [...] shall not be granted refugee status'.¹⁰⁸ In a similar vein, Article 1F of the Geneva Convention fixes that refugee protection must be denied to 'he [or she] who is guilty of acts contrary to the purposes and principles of the United Nations'.¹⁰⁹ At the same time, however, the United Nations encourages examiners to treat 'duress', 'superior orders' and 'coercion' as extenuating circumstances. In its guideline on application of the exclusion clause, UNHCR urges examiners to keep in mind that 'applicants may have a valid defence to a crime or act committed'.¹¹⁰ The form of indeterminacy that this creates is triggered by a potential ambiguity involving alternative readings of refugee law that give different emphasis to the rules on exclusion and extenuating circumstances.

In Mrs C's case, indeterminacy is triggered by the vague way in which the refugee law defines 'well-founded fear'. If the expression is read as meaning 'well-founded in facts', then the Cáritas lawyer and diplomat could perhaps agree that the Ivory Coast is safe and conclude that Mrs C is not a refugee because her fear is not 'well-founded'. On the other hand, if well-founded is read as meaning 'the well established presence of the psychological state of fear', then examiners might conclude that, because Mrs C's fear is 'well-founded' by its authenticity, she is indeed a refugee. We can thus read Mrs C's case as an example of indeterminacy linked to the vagueness of the notion of well-founded fear, which can be read with either an objective or subjective spin.¹¹¹

Should the violence endured by Mr B mitigate his crimes? Does well-founded fear mean fear that is founded in facts about the country of origin or fear that is genuine? The fact that status determination involves dealing with this sort of question suggests that – at least in some cases – the refugee law is not clear-cut enough to determine the procedure's outcome.

So far in this section, I have relied on Mr B and Mrs C's cases to illustrate this first sense in which status determination can be said to be indeterminate. These examples have allowed me to take a first step away from the declaratory image of

status determination, which accounts for asylum decisions as a matter of ‘assessing whether an asylum seeker’s case meets the refugee definition’.

The bottom line of this discussion is that there is no right answer ‘disclosed’ by examiners and that the work of status determination should not be treated mechanically, as a matter of submitting cases to law. This argument, I’m sure, will come as no surprise. The more relevant question I want to prompt, however, is the one that comes next: even if we accept that the work of status determination involves navigating instances of indeterminacy, there remains the question about how significant this form of indeterminacy is. Beyond some hard cases, does the fact that asylum decisions are not fully constrained by the law allow us to claim that decisions justified in terms of legal fit are untrainable? The next section will assess this issue by dwelling on remarks made by examiners in Brazil concerning the differences between easy and hard cases.

Easy and hard cases

Mr B and Mrs C’s cases illustrate a first sense in which the refugee definition can be said to be indeterminate. The kind of indeterminacy the two cases exemplify has its source in the open texture of the language with which refugee law is written, which gives rise to vagueness and ambiguity. The discussion on the last section has focused specifically on the issue of source (where does this kind of indeterminacy come from?). In this section, I will take the narrative back to Brazil to dwell on the issue of ‘reach’ (how significant is the phenomenon?). I will argue that what makes this first kind of indeterminacy weak is the fact that it restricts the phenomenon of indeterminacy to hard cases.

Consider the remarks below, in which examiners discuss the differences between cases they see as complex and cases they see as straightforward.

[An examiner] You know, when you go and look at the decision, when you follow it through, sometimes you find that it could have gone either way. I don’t know. My experience is that although this is very deep, the categories organize this protection somehow. You know ... ‘this person is closer to this category or to that one’, and all that. If the case has clear basis for asylum, you can recommend recognition with more certainty. But if the guy is in this frontier here [drawing line with hands] that has this economic issue, then, depending on the case, you pretty much know it will be denied.

In itself, to recognize that the work of status determination involves dealing with moments of indeterminacy doesn't imply that the phenomenon prevents the ultimate task of distinguishing migrants and refugees. Examiners can recognize that episodes of indeterminacy occur every now and then. They can concede that there is something very deep about the refugee definition that makes it 'open' somehow. And still, in spite of acknowledging all this, they can insist on justifying denial by talking of a lack of legal fit.

The Brazilian law has this overtone that considers human rights violations as basis for asylum, so there is some wiggle room for you to try to defend this sort of case. But, of course, there are cases that are more evident, you know ... cases when you know for sure that the person will be labelled an economic migrant and an irregular migrant and will have the request denied. And there is the other extreme too, of course. You know ... the guy comes from DRC, brings a lot of documents, etc. etc. ... the story is coherent, you have reports that his hometown is going through problems, etc. etc. Naturally, you can suppose this guy will most likely be accepted as a refugee.

A remark like this, about 'overtones' and 'wiggle room', acknowledges that the assessment of legal fit is stricken by indeterminacy – at least sometimes. It reminds us that deciding on a request is not so simple a matter of contrasting case against law. At the same time in which it brings up indeterminacy, however, the reaction makes the phenomenon a little less biting. By contrasting the case in which there is wiggle room from the case that is 'more evident', this remark simultaneously hints at indeterminacy and restricts its reach.

Cases when the person brings elements which are clear enough and when all elements indicate that there is basis for asylum; these I would count as evident. If the person is coming from a region known to be a region where there is persecution or a long-lasting conflict, for instance, or if the persecution is well documented... And, also, there are cases when it is pretty evident that there is no basis for asylum. It also happens. Sometimes we have already examined 10, 20, 50 similar cases, and all the applicants made a, say, very weak argument, without any elements indicating persecution. These cases are evidently more prone to denial. We study them carefully, of course. We look at all the information. But it doesn't make sense to linger too much.

In some cases it is indeed hard to tell whether the person is a migrant or a refugee. In other cases, however, establishing the difference is pretty straightforward. Examiners's remarks on indeterminacy would often develop in this way. Examiners would start by telling me of cases in which they found themselves torn between vague terms and conflicting rulings. And then they would follow these stories with appeals to some sort of tacit knowledge, insisting on their ability to distinguish cases that are hard from cases that are straightforward.

I am talking about cases that are pretty evident here. Sometimes the person even believes that she is entitled to asylum, but the argument is very weak ... there is no element of persecution involving her. I'm not saying that the decision is completely obvious, of course. The interview is made in all fairness; I want to stress that. But more often than not there is no basis for asylum. You have to remember that the examiner is doing this all the time; thinking about cases, doing research, etc. And, to a great degree, cases are similar to each other. So we need to trust the examiner that is there, every day, doing the work.

I dwell on the examiner's ability to distinguish hard and straightforward cases in Chapter 2. For now, what I want to bring out in these remarks is the bouncing movement of acknowledging and restricting indeterminacy at the same time. If we connect these remarks to how the indeterminacy phenomenon has been dealt with in legal theory, one way of making sense of this bouncing movement is found in Hart's contrast between easy and hard cases.

Although acknowledging indeterminacy, Hart claims that the phenomenon is of limited significance. The search for a shared understanding of the law can indeed give rise to indeterminacy, he claimed. But this phenomenon will affect only a relatively small number of cases in comparison with the vast majority of cases in which the laws will be precise enough to determine the ruling. In a classic example, Hart asks us to imagine a scenario in which, invoking a legal rule that forbids the presence of vehicles in public parks, a case is opened asking that bicycles be forbidden in a certain park. Hart suggests that indeterminacy is triggered in this case by the term 'vehicle', which gives room for doubt on whether or not bicycles fit this category. Hart insists, however, that in spite of

this potential indeterminacy, there is a majority of cases in which the meaning of 'vehicle' will be clear enough to determine whether the prohibition applies or not. For instance, if a truck drives through the grass in Hyde Park it will be clear that the prohibition against vehicles in public parks is being violated.

Hart establishes two contrasts to express this insight: the first opposes the 'core' and the 'penumbra' of legal meaning. The second contrasts 'easy' and 'hard cases'. A word like vehicle, he explains, has a core of determinate meaning and penumbra or 'fringe' of indeterminate meaning. Easy cases would be those in which the legal text can be read in its core, being clear enough to determine whether a legal rule applies. Hard cases, in turn, would be those in which the reading of this legal rule falls in this fringe. In Hart's definition, in spite of whether the decision took a lot of paper work or was relatively quick, what makes a case hard is that its outcome will ultimately consist in a discretionary decision by the adjudicator.¹¹²

A consequence of accepting that indeterminacy holds only in a certain number of cases is that this number can be reduced to an extent at which the phenomenon stops being relevant. That is the strategy adopted by scholar of constitutional law Ronald Dworkin in his reaction to indeterminacy. In his *Taking Rights Seriously*, Dworkin attacks the notion of hard cases for giving too much room for uncertainty. The error, Dworkin argues, is caused by the fact that the conception of law used to define hard cases is too restricted. For Dworkin, the discussion on whether the law can determine the outcome of cases ought to define law beyond the prima facie legal rule, including also 'principles, policies and other standards' on which adjudicators might rely.¹¹³ The idea of precedents – the way similar cases have been dealt with in the past – plays a key role in this reaction to indeterminacy. A precedent, Dworkin claims, 'is the report of an earlier political decision; the very fact of that decision [...] provides some reason for deciding other cases in a similar way in the future'.¹¹⁴

These arguments are meant to show that, when examiners distinguish 'complex' and 'evident' cases, they are speaking about indeterminacy in a way shared by legal theorists. The kind of indeterminacy illustrated by cases like Mr B and Mrs C's affects the declaratory way of accounting for decisions. These

cases show that refugee law is not always clear enough to work as a rule on which examiners can rely to separate migrants from refugees. And yet, as the remarks above indicate, to acknowledge this kind of 'open-texture indeterminacy' doesn't stop examiners from relying on legal fit to justify their decisions. When talking about the difference between complex and straightforward cases, examiners' discourses move in something like a swing: they acknowledge that indeterminacy affects hard cases while retaining the use of legal fit as a credibility indicator in more evident claims.

So far, the argument has followed this motion, starting with arguments that highlight indeterminacy and later discussing how the phenomenon can be constrained. I took as a starting point the assumption that 'status determination consists in assessing whether an asylum seeker's case meets the refugee definition'. I then discussed how this picture comes under pressure, both as expressed by examiners and in the forced migration literature. And, in this section, I sought to unpack a way of talking that enables examiners to react to indeterminacy while retaining legal fit as a justification for decisions.

Having introduced this first form of indeterminacy, I turn now to a stronger version, which I believe is more significant to status determination. In the next section, I characterize strong indeterminacy around the same axes I relied on to characterize the weak version: the phenomenon's source and reach. The weak form of indeterminacy I have been discussing so far is triggered by the open texture of legal language. The strong version I discuss next has its source in the act of following a rule. Weak indeterminacy is restricted to hard cases. Strong indeterminacy has a general reach, affecting cases that might at first be considered straightforward. The question prompted by this stronger version of the indeterminacy thesis is not whether the refugee law is determinate enough to fix the outcome of a case, but whether the absence of legal fit can be offered as a justification for the asylum decisions it is meant to support.

Strong indeterminacy

Whether human behaviour can be justified in terms of rule-following has been a topic of discussion in the field of science studies from the literature's outset.

Science studies gained visibility in the 1970s, with its proposal to study empirically topics that were until then considered the domain of the theory of knowledge. The work of Austrian philosopher Ludwig Wittgenstein was one of the main sources of inspiration for this project. Wittgenstein's work on the notion of rule-following proved particularly relevant, and gave rise to a rich discussion on the social implications of linguistic indeterminacy. One topic proved particularly controversial among sociologists – that of how we can believe in indeterminacy and account for the fact that human behaviour is nevertheless orderly most of the time. Different approaches to this question were derived from different readings of Wittgenstein's work.¹¹⁵ Some authors went on searching for an answer by studying the power of conventions, common training and social positioning to inform individuals' dispositions and organize behaviour.¹¹⁶ Other authors sought to account for the possibility of orderly behaviour by studying aspects that are intrinsic to the practices analysed: the way actors talk, how actors behave when communicating and what other methods actors use to organize their day-to-day interactions.¹¹⁷

My interest in the everyday work of status determination places this study closer to this second approach. I justify my focus in the detail of determination practices in Chapters 2, 3 and 4. The point now is to give a sense of how my concern with strong indeterminacy is inspired by the broader project of the science studies field. In this section, I want to suggest that the work of status determination is stricken by a strong form of indeterminacy first identified by Wittgenstein. This form of strong indeterminacy challenges the distinction between easy and hard cases and has its source in the very act of following a rule.

Let us go back to the case of Mrs A, which we came across at the start of the chapter. Consider again the justification given by Conare for denial. According to the justification letter, Conare's plenary decided to reject Mrs A's request because 'it was not proven the existence of a well-founded fear of persecution compatible with the eligibility criteria fixed by art. 1° from Law 9.474'. The picture here is one in which examiners took into consideration whether Mrs A's case met the refugee definition as fixed by article 1 and, after studying her case, concluded that the eligibility criteria were not fulfilled. The decision for denial is

attributed to this lack of legal fit. Notice that, in justifying denial this way, examiners are making reference to a sense of requirement. There is a sense that Conare *ought to* deny Mrs A's request if the eligibility criteria fixed by article 1 was to be respected.¹¹⁸

Now, implied in this justification is the assumption that examiners are in a position to tell when a case is 'compatible' with the intended meaning of article 1. Mrs A's request amounts to the claim that her case fulfils the refugee definition. In accounting for a negative ruling in terms of lack of legal fit, Conare's plenary is claiming that it doesn't. But what evidence can these examiners give to show that this conclusion is right? How can they show that they are respecting the intended meaning of the refugee definition when they decided to deny Mrs A's request? A strong kind of indeterminacy comes to the fore when we ask examiners to demonstrate the basis for this conclusion.

To make this strong form of indeterminacy easier to grasp, I will put the real case aside for now and make use of what is known in academia as a thought experiment. I will create a mental picture of how Mrs A's case could have progressed, in order to help readers experience strong indeterminacy, instead of trying to explain it in abstract. As historian of science Thomas Kuhn once put it, the function of thought experiments is not to arrive at some sort of deeper truth about the issue at hand. Rather, by positing a situation that, although thinkable, might otherwise not occur in a natural way, a thought experiment is meant to highlight 'misfits between experience and implicit expectations' and provide 'clues' on how to rethink the situation.¹¹⁹ That is what my thought experiment consists of: by positing a situation that, although perfectly possible, will probably sound absurd, I want to highlight an implicit assumption about the determinacy of the refugee definition and offer a clue on how we can look at status determination in a fresh way.

To start with, let us imagine that a fierce controversy broke out in the plenary meeting around Mrs A's case. As protagonists, we have a diplomat and a rather sceptical lawyer. The diplomat's position is that, if Conare is to follow the intended meaning of the refugee definition, it must deny Mrs A's request. The sceptical lawyer, on the other hand, disagrees with this conclusion and argues

that, if the plenary is to follow the refugee definition, Mrs A's request must be accepted. My starting point is the question: what evidence can the diplomat produce to show that a negative decision would be consistent with the intended meaning of the refugee definition? I will consider two ways in which the diplomat can try to justify denial. Each of these attempts is followed by arguments the sceptical lawyer could make to reject these justifications.

Let us consider a first way in which the diplomat might try to convince the sceptical lawyer that a negative decision would be the right one.

[Diplomat, voting for denial] We are deciding for denial because we are following the refugee definition. If you doubt that, all you have to do is to look at this list of precedents, which shows how the refugee definition has been applied before. I guarantee that, if you look at these precedents, you will see that the refugee definition has been interpreted in the way we are interpreting it.

This is a first way in which the diplomat could try to show that a negative decision is in line with refugee law. In this first reaction, the diplomat justifies the negative recommendation by making reference to how the refugee definition has been applied in the past. Once again, at stake here is whether the diplomat can show that denial is in line with the intended meaning of the refugee definition. In this scene, the diplomat insists that, in denying Mrs A's request, Conare would be interpreting the refugee definition the way it has been interpreted before and, to prove this, offers a list of precedents.

[Diplomat] I am interpreting the refugee definition in the same way it has been interpreted before. This brings me to the conclusion that Mrs A's case doesn't meet the criteria of well-founded fear of persecution fixed by the law. That is why I am voting for denial.

Note that, in answering like this, the diplomat is giving an answer that is similar to Dworkin's reaction to indeterminacy discussed in the last section. Dworkin suggested that a decision might seem legally indeterminate, but that the use of precedents, together with other standards and principles, allow adjudicators to arrive at the right ruling. The diplomat in this scene is following a similar logic: trying to show that a negative decision is supported by the refugee definition by

showing that a negative decision would be consistent with the way similar cases have been decided before. The assumption here is that, if the diplomat can show denial to be justified using the definition as it has been used before, this would be enough to overcome the doubts raised by the sceptical lawyer.

Having looked at this first attempt to justify the denial of Mrs A's case, I want now to illustrate how strong indeterminacy undercuts it. Consider the scene below. The sceptical lawyer reacts to this first attempt by the diplomat to justify denial. Even after the diplomat offers this list of precedents, the lawyer continues to question that Conare is following the law in denying Mrs A's request. Answering the diplomat, the lawyer defends a new way of interpreting the refugee definition and dismisses the interpretation made by the diplomat as wrong. The lawyer claims that, in the previous cases, the decisions only seemed to be in line with the diplomat's reading, but they were actually in line with this alternative interpretation.

[The lawyer, answering the diplomat] There is this way of interpreting the definition (#1) that you use. But there is also another interpretation (#2), which is the one I use. In all these precedent cases you just mentioned, we would have got to the same conclusion by interpreting the refugee definition according to interpretation #1 or according to interpretation #2. Mrs A's case is different, however. In Mrs A's case, following 'the right' interpretation requires us to accept the request.

The lawyer's answer allows us to grasp how strong indeterminacy affects the diplomat's attempt to justify denial. The diplomat tries to justify denial by claiming that a negative ruling is supported by precedent. As mentioned above, the assumption is that, if the diplomat can show that denial of the case follows the definition as it has been used before, this would be enough to overcome the doubts raised by the sceptical lawyer. The answer given by the sceptical lawyer prompts strong indeterminacy by showing that this assumption doesn't hold.

The compilation of previous decisions invoked by the diplomat in support of interpretation #1 might include all instances of previous use. The answer given by the lawyer shows that not even this exhaustive list of precedents would be enough to dismiss the sceptical claim that the definition should be read differently. The list of precedents might include all examples of previous

decisions to suggest that Conare, in refusing Mrs A's request, would be following the refugee definition as it has been used before. The sceptical lawyer can concede that. Still, she simply adds that all these previous decisions would be equally compatible with interpretation #2. This subtle nudge in the lawyer's argument undercuts the power of even an exhaustive compilation of precedents to determine the meaning of the refugee definition.

So far, we have considered how strong indeterminacy affects the possibility of determining the meaning of the refugee definition through reference to past use. The upshot of the argument so far is that the diplomat's (and Dworkin's) initial attempt to justify denial through reference to past use cannot dismiss the doubts raised by the sceptical lawyer. As the set of previous use is finite, the use made of the definition in a new case can always be shown to be consistent with precedent while at the same time being consistent with a non-linear interpretation.¹²⁰

Now let's consider a second way in which the diplomat could try to show that a negative decision would be in line with the meaning of the refugee definition. In the real world, our sceptical lawyer would probably be fired or locked in a mental hospital by now. But continuing in our thought experiment, let us suppose that the diplomat is still trying to prove that a negative decision on Mrs A's case would be in line with the refugee definition. Let us consider now how this diplomat could try to prove that the lawyer is wrong in defending the alternative reading (interpretation #2) of the definition. How can the diplomat prove that her way of reading the refugee definition (interpretation #1) is what is actually meant by the refugee definition and not the alternative reading defended by Caritas's lawyer?

The diplomat's first reaction – to make reference to past use – proved insufficient to dismiss the doubts raised by Caritas's lawyer. To try to overcome this, in a second reaction, the diplomat doesn't try to justify the negative decision by making reference to past use. Instead, the diplomat makes reference to a set of clarification notes and procedural handbooks in place to settle doubts about how the law must be read. In doing this, the diplomat is again following in Dworkin's footsteps, trying to counter indeterminacy by expanding the domain of the law to include these interpretative guidelines.

[Diplomat] We don't decide on new cases by checking past use. We are capable of following the definition even in cases we haven't come across before. This is possible because we have clarification notes and handbooks that tell us what the terms in the definition mean. So, when the definition says something like 'refugee status is reserved to individuals who have a well-founded fear of persecution', we know what 'well-founded fear' means and we decide accordingly. If this expression is vague, we can rely on a clarification note discussing the standard of proof to understand what 'well-founded fear' means.

This scene illustrates a second way in which the diplomat can seek to show that denying Mrs A's request would be in line with the refugee definition. Here, the diplomat is seeking to demonstrate the absence of legal fit by making reference to auxiliary definitions. The underlying assumption in this answer is that, when examiners decide on a case, they don't check past use and try to decide new cases accordingly. Instead, they understand the meaning of the terms that compose the definition. When a term proves vague or ambiguous, examiners can count on clarification notes that define how the term is to be read.¹²¹

The idea that the terms used in law can have their meaning clarified sounds reasonable enough. It makes even more sense if we keep in mind the many handbooks and guidelines published by the United Nations to establish a common 'hermeneutic' of refugee law. As intuitive as it might sound, however, the problem with an answer like this is that the interpretative rule invoked by the diplomat is just as affected by strong indeterminacy as the original definition it is supposed to elucidate. For example, the diplomat suggests that the meaning of 'well-founded fear' might be clarified if we check a note on the standard of proof. In this note, in turn, we read that, to be well-established, a claim must be 'plausible' and 'coherent'. Relying on this note to justify the denial of Mrs A's request would thus assume that the diplomat is in a position to prove that she or he is interpreting 'plausible' and 'coherent' in line with the intended meanings of these terms.

When our thought experiment gets to this point, we are faced with a strong form of indeterminacy, which occurs in the very act of following a rule. 'How can I justify my present application of such a rule, when a sceptic could easily interpret it so as to yield any of an indefinite number of other results?'¹²²

On Rule-Following

Wittgenstein developed his insights on rule-following using the image of a child in a math class. As examiners find rules on how to decide in legal books, the pupil finds in a math book a rule on how to calculate. The teacher gives examples of this rule being applied, writing at the blackboard ' $2+2=4$, plus $2=6$ ', continuing this sequence until ' $998+2=1000$ '. The teacher then asks the student to 'follow this rule, adding two from 1000 onwards'. Reacting to the instruction, the student writes ' 1002 , 10022 , 100222 '. Irritated, the teacher rebukes the student for 'not following the rule properly'. Wittgenstein's question is: Is there any way to prove this student is not following what the rule 'actually said'?¹²³

American philosopher Saul Kripke uses a slightly different image to make this point. As a student taking a math test, you are asked to fill the blank in ' $68+57=_$ ', to which you dutifully answer ' 125 '. At this point, a sceptic enters the scene, claiming this answer is wrong. 'You interpreted the sign "+" as "addition", but what it *actually means* is that you should follow the rule of "quaddition", in which case the right answer would be "5"'.¹²⁴

As my diplomat tries to answer the lawyer, the student seeks to justify the results through reference to past use. Although she hadn't done this precise addition before, she claims she has interpreted the sign '+' in the way it has been used in countless operations before. To this, the sceptic gives the disconcerting reply: 'In all these previous uses, you would get the same result by reading "+" as meaning addition or quaddition. But " $68+57$ " is a new case. You might believe that you got to " 125 " because you were following the rule of addition. But had you followed what the rule actually means, you would have arrived at "5" as a result'.

At this point, Kripke tells us, the student could react by dismissing the argument as nonsense. The student could reply that when he learned to do addition, he learned a formula and not a list of examples. 'When you tell me to do " $68+57$ ", what I read is "step 1: collect 68 marbles. Step 2: collect 57 marbles. Step 3: put all these marbles together in the same set. Step 4: count the number of marbles in the final set". Following this algorithm will bring me to 125!' According to Kripke, this reaction can sound correct, but it only postpones indeterminacy. The sceptic can immediately rebuke,

'In this formula you just described, you misinterpreted the word "count" in the phrase "count the number of marbles in the final set". When this formula says "count" it means that you should do the operation of "quounting". In all examples you came across before, you would get to the same result by "counting" or "quounting" the set of marbles. But this operation is different.' and so forth.

What we have here is the beginning of a regress. The student can try to specify the intended meaning of the rule of addition as much as she wants. But, in invoking 'a rule on how the previous rule must be read', she is just postponing the problem. Eventually, 'justifications come to an end somewhere'¹²⁴ and we are 'left with a rule which is completely unreduced to any other'.¹²⁵ The conclusion Kripke takes from this is that the reason why an action is recognized as an instance of rule-following is to be found not in the meaning of the rule. Instead, it is to be found in the *social conditions* by which an assertion to be 'following the rule' is itself accepted as valid.¹²⁶

As we have seen at the start of the section, the justification given by Conare says that Mrs A's request was denied because 'it was not proven the existence of a well-founded fear of persecution compatible with the refugee definition'. As I notice above, a justification like this assumes that examiners are in a position to tell when a case is 'compatible' with the intended meaning of the refugee definition. The strong form of indeterminacy has its source in the fact that examiners have no basis to tell when this 'compatibility with the rule' has been established or not.

In his first reaction, the diplomat tries to show that denying Mrs A's request would be to apply the refugee definition as it has been used countless times before. Indeterminacy is not dispelled here, however: no matter how exhaustive is the compilation of precedents, these instances of previous use can be shown to be equally compatible with the alternative interpretation defended by the sceptical lawyer. Faced with this defence, the diplomat can seek to justify his assessment of lack of legal fit by showing that his reading of the refugee definition is supported by the procedural guidelines, clarification notes and any other rules that specify how the definition must be interpreted. Again, the sceptical lawyer can create reasonable doubt by asking the diplomat to demonstrate that the use made of these rules of interpretation is in line with their intended meaning.

At the end of the day, the upshot of the thought experiment is that, as 'every course of action can be made out to accord with the rule' it would seem that 'no course of action could be said to be determined by a rule'. The sceptical lawyer is able to show that an alternative interpretation of the refugee definition would be just as supported by precedent and by the interpretation guidelines as would be the diplomat's interpretation. That implies that neither the diplomat nor the lawyer can claim to be acting in accordance with the refugee definition, which, in turn, implicates that neither of them can justify their recommendation regarding Mrs A's request in terms of compatibility with this definition.

In what concerns its reach, 'rule-following indeterminacy' is stronger than the version of the phenomenon triggered by the open texture of refugee law. The problem this strong form of indeterminacy raises for the declaratory model puts

in question the very distinction between complex and straightforward cases. If Wittgenstein's insights on rule-following are not nonsense, this would seem to suggest that cases are never 'easy', in the sense of their having been 'decided by being brought under the intended meaning of the law'. To bend a phrase, no matter how evidently an asylum request might seem 'to lack fit with the refugee definition': examiners would be giving a misleading account if they justified denial by saying they are following the law. In our thought experiment, a sceptical lawyer brought this strong form of indeterminacy to our attention by asking questions that would be considered absurd otherwise. In the real world, justifications for denial that invoke lack of legal fit can go unchallenged. The logical impossibility of showing that an asylum request 'lacks fit' with the refugee definition remains, nevertheless.

Indeterminacy as a practical problem

It is intuitive to assume that examiners can decide on Mrs A's request by assessing whether it fulfils the refugee definition. But is the refugee law determinate enough to tell whether Mrs A is a migrant or a refugee?

The answer this chapter encouraged is negative. With my thought experiment, I sought to show that accounts that justify denial by pointing to a lack of legal fit are subjected to a strong form of indeterminacy that has its source in the act of rule-following itself; as any course of action can be shown to be compatible with the refugee definition, no course of action can be justified in terms of legal fit. This strong form of indeterminacy, I have argued, cannot be overcome through reference to precedent or clarification notes. The legal texts that define a refugee, including these precedents and interpretative guidelines, offer no ground for examiners to stand on to assess the degree of legal fit.

The argument is *not* that refugee law is indeterminate because it is based on an untenable distinction between forced and voluntary migration. As the box on forced migration was meant to show, this point has been rehearsed in the scholarly debate. In this literature, a controversy exists concerning the value of the migrant/refugee contrast. Authors who are critical of the distinction question the possibility of saying whether a migrant was forced or chose to

move. Others insist that migrants and refugees belong to different categories and strive to establish the difference on new grounds. Both sides invoke danger as rhetorical strategies, warning us of eerie policy repercussions that might result from insisting or dismissing the distinction.

Although I see truth in both sides of the argument, this chapter sides with neither of them. Instead, I have sought to call attention to a stronger sense in which the distinction between refugees and migrants is indeterminate. This strong form of indeterminacy has to do less with whether the definition is vague and more with its capacity to guide a decision. It takes us beyond the trite point that examiners can make a cynical reading of the law or that the definition can be read in more than one way. The conclusion this form of indeterminacy invites is stronger: no matter how evidently a case might seem to lack legal fit, attempts to account for a decision in terms of 'I am following the rule' are ultimately unsound. Examiners could recommend a different decision altogether and, still, there would be no reasonable ground to dispute they were following the same rule. To paraphrase Kripke, any present intention could be interpreted so as to accord with anything examiners choose to do. So there can be neither accord, nor conflict with the refugee definition.¹²⁷

We are starting to invert scepticism here. To say that decisions on asylum requests consist in assessing whether the case fulfils the requirement established by the refugee law seems almost self-evident. Examiners talk of conflicting rules and vague phrases but insist that, at least in straightforward cases, it is possible to establish whether the person is a migrant or a refugee by following the law. Likewise, in the scholarly literature it is often mentioned that the distinction between migrants and refugees is fragile. Yet, this remark is often taken as a call for a more precise definition.

What this strong form of indeterminacy suggests is that the greatest challenge affecting attempts to establish this distinction has to do not with the possibility of establishing a rule of differentiation. The challenge lies not in whether it is possible to produce a functional definition of refugees that allows them to be differentiated from other kinds of migrants. Instead, it has to do with a form of indeterminacy examiners face in practice, when they have to assess whether a

case fits this definition. This strong form of indeterminacy is not a definitional problem. It is a practical problem, concerning the very act following a rule.

How is it decided?

Strong indeterminacy puts in question examiners' capacity to show what the refugee definition 'actually means' (the possibility of demonstrating intended meaning). This, in turn, puts in question the possibility of accounting for an asylum decision as the outcome of following this definition. If examiners can't determine what the refugee law actually means, they can't invoke it to justify their decisions. Assuming we accept that attempts at rule following are subject to this strong form of indeterminacy, the question then becomes: what difference does this make to how we account for asylum decisions?

In Mrs A's case, examiners considered that the case didn't meet the criteria of refugee-hood established by the national act. That, they claimed, was the reason why they voted for denial. If this strong form of indeterminacy is not nonsense, it would seem that their recourse to legal fit as a justification for denial ceases to be an option. Examiners could go for either a positive or a negative ruling and still show this decision to be in agreement with the refugee definition.

By arguing that status determination is subject to strong indeterminacy, my goal is not to suggest that decisions are arbitrary, but to restate my initial question in stronger terms. In the everyday work of status determination, the matter of who is a migrant and who is a refugee is settled, *somehow*. The argument of indeterminacy brings into question the possibility of justifying this distinction in terms of a case's fit with the refugee law. The decision on whether the asylum seeker is a migrant or a refugee must then be accounted for in some other way. The question this leaves us with is, once again, 'how?'

It would be easy to consider the argument that asylum decisions are not determined by the law as an indication that these decisions are discretionary.¹²⁸ It could seem, then, that the reference to the lack of legal fit does no more than legitimize what is an arbitrary and discretionary decision. The next chapters will seek to tackle this question differently, by showing how decisions are arrived at, not as a discretionary exercise, but as a contingent and heterogeneous process.



[Picture 3 – Answering Questions]

Gathering Evidence

Questionnaire, copy machine, cover letter and goodbye. In the months I worked in Cáritas, I saw this small arrangement recreated time and time again. I took part in it myself. For, in Cáritas, volunteers are quickly drawn into the work. The staff does the best it can with the limited resources it has. But resources are, indeed, very limited. There is not enough money or enough people to do all that needs to be done. As a result, anyone who volunteers to do something is more than welcomed to give it a go. In a very selfish sense, this had the upside of giving me access to all the practices I offered myself to. Less than a month in, I saw myself carrying out tasks that I had hardly expected to be allowed to observe. I worked as an interpreter, led eligibility interviews and even wrote legal recommendations. During my time in Cáritas, far from being the detached observer that is idealized by some versions of anthropology, I was an active cog in this heterogeneous array of people, forms, paper piles and copy machines.

In this chapter, I tell some more stories about status determination in Brazil. In Chapter 1, I have relied on the notion of strong indeterminacy to problematize the use of legal fit as a justification for denial. I also discussed a discursive device that enables examiners to circumvent indeterminacy by contrasting cases they accept as complex and cases they insist are ‘more evident’. This chapter continues the inquiry by discussing the role played by empirical support in the declaratory model of asylum decisions.

In its *Note on Burden and Standard of Proof in Refugee Claims*, UNHCR recommends that, in order to assess a case’s strength, ‘the adjudicator should take into account corroborative evidence adduced by the applicant in support of his/her statements’, as well as ‘consistency with common knowledge or generally known facts’ and ‘the known situation in the country of origin.’¹²⁹ Chapters 3 and 4 will discuss the image of examiners ‘declaring’ a case’s strength and the

use of consistency as an indicator of credibility. This chapter focuses on examiners' reliance on empirical support to distinguish weak and strong cases. Deconstructively, I take issue with the assumption that examiners can arrive at a decision by assessing whether the case is 'corroborated by evidence'. Reconstructively, I will foreground a feature of the examiner's discourse and show how it helps to enact the perception that a case is empirically supported.

The stories that follow pivot around what struck me as a recurrent feature of examiners' talk: when commenting on their decisions, the examiners I met would often lay hold of what impressed me as one-sided arguments. Speaking of cases that they saw as clearly weak, examiners would tie their negative decisions to this intrinsic quality of the case. In contrast, when commenting on controversial cases – especially when the official ruling went against their views – these examiners would explain the case's outcome in more elaborate terms, pointing to extrinsic physiological and social factors. Borrowing a term from the science studies field, I use *asymmetry* to name this way of reasoning, in which decisions on 'more evident' and 'more complex' cases are differently justified.

As in Chapter 1, the negative dimension of the argument will seek to problematize the declaratory picture of status determination. I will argue that decisions to deny asylum requests cannot be accounted for by pointing to a lack of empirical support. For, during status determination, which decision is supported by the evidence available is itself under-determined and under dispute. And here's the catch: this applies to straightforward cases as well.

When an asylum seeker like Mrs A fills in an asylum request, she is making a series of statements. According to the default picture, examiners can arrive at a decision by considering whether these statements are in line with known facts. Accounting for their decisions on asymmetric terms, examiners jump from law and evidence to social and psychological bias when justifying decisions on more evident and more complex cases. By doing so, they 'black-box' the procedure, which kills the drive to ask how asylum requests that strike them as empirically weak were enacted as such. By the end of the chapter, that is the question I hope you will be asking yourself.

I begin by looking at how examiners justify their recommendations when faced with a controversy concerning empirical support. I then look in detail at the communications of a Conare examiner and a UNHCR officer to highlight an asymmetry in how they account for decisions on empirically-strong and empirically-weak claims. Finally, I conclude by spelling out why I am convinced that accounts that tie negative decisions to lack of empirical support are self-defeating and why we are better off leaving them behind.

Dissent

Cáritas's lawyer takes note. Case number 36: Mr D, male, citizen of Ghana, requesting asylum to avoid ethnic persecution. Cáritas's lawyer recommends recognition. Conare's representative argues that the case lacks empirical support and recommends denial.

For Conare, there are signs that someone else answered the request questionnaire for Mr D: phrases used by him were identical in different documents. The officer says Mr D omitted information from Cáritas: he said to Cáritas that he was in hiding, while the evidence suggests that he was arrested. Commenting on the political context in Ghana, the Conare officer argues that ethnic persecution is restricted to the country's northern region and that the most recent report by Amnesty International doesn't support the allegation of ethnic persecution. For Conare, there is no well-founded fear.

IMDH's representative disagrees. She accepts defining Ghana as democratic, but stresses the existence of ethnic conflicts. Commenting on the Amnesty International report, she focuses on the human rights elements. In the lawyer's opinion, she claims, whether or not there was direct persecution is not the key issue in Mr D's case. For her, the basis for Mr D's request lies in the conflict itself and the widespread human rights violations it generates.

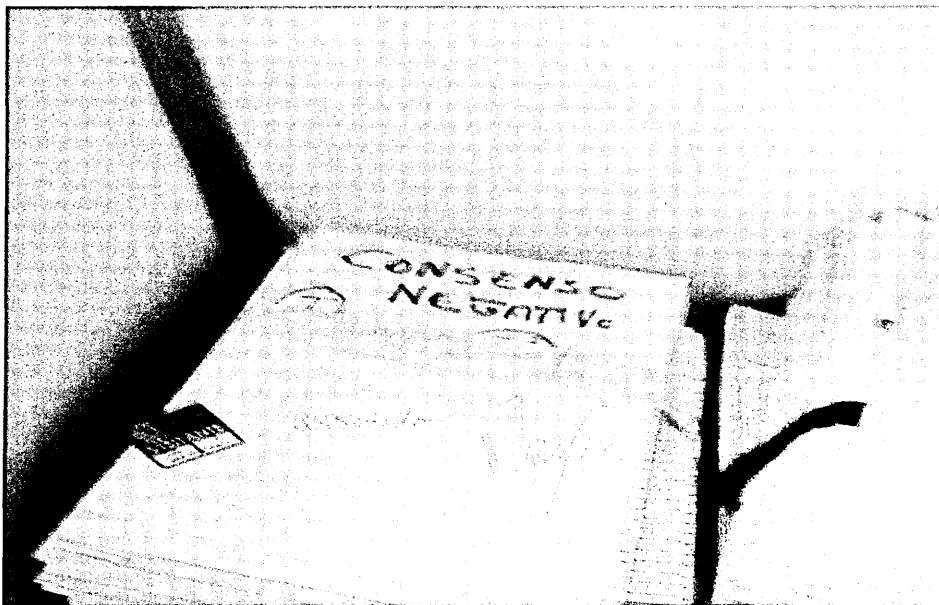
Conare's officer continues to disagree. While for Caritas the legal basis for the request lies in the human rights violations, for Conare the interview made it clear that the claim of persecution is related to the rise to power of a political group. The ethnic conflict is secondary to the political dispute, the Conare officer insists. He mentions that, in a different case, the asylum seeker who was recognized as refugee belonged to an ethnic group that opposed Mr D's ethnicity. This, the officer claims, shows that it would be incoherent to recognize Mr D as a refugee.

No agreement. Case sent to the plenary meeting without a recommendation.

In this scene, envoys of different Brazilian ministries, the Federal Police, Conare, UNHCR, Cáritas and other civil society agencies are gathered in the annex

building to the Justice Ministry in Brasília. They are members of the Group of Preparatory Studies, which is abbreviated to GEP in Portuguese. Their task is to propose first rulings for asylum requests, which are later forwarded to the Conare's plenary. GEP members discuss a list of cases during the day. When disagreement is strong, the case is labelled 'undecided' and sent to the plenary without a recommendation attached to it. Mr D's case was one of these.

This scene caught my attention thanks to the interpretative flexibility it captures: lawyer and officer have different views on what the case recommends, based on different ways of assessing the evidence.¹³⁰ Both examiners make reference to the same Amnesty International report as empirical footing. But they read the report in rather different ways. Should persecution for ethnic reasons be given priority, as Conare's officer defends, or should we focus on the issue of human rights violations, as sustained by Cáritas? The lawyer points to the report and says that the asylum request should be accepted. Conare's officer points to the same report but argues that the request should be denied. They cite different passages and attribute different relevance to them. They find some sections worth mentioning while others are ignored. In a case like this, when the interpretation of evidence seems laden by different world views, how is it decided whose reading of the evidence is right?



[Picture 4 – Negative Consensus]

Disagreements like this, about how to read a human rights report, might sound insignificant, but their potential repercussions are serious. The risk of denying asylum to someone who needs it is very real. And, for some examiners, the chance of granting protection to someone who doesn't fit the refugee definition sounds equally vexing. So to avoid 'trivializing the asylum institution', as some officers are wont to say, examiners tend to be rather watchful of the justifications they give for their rulings. Examiners avoid psychological prejudices and social pressures as sources of error.¹³¹ These 'external' factors may lead examiners to apply the law biasedly or to rely on misleading evidence. So, to prevent mistakes, examiners keep constant guard against them. Their ultimate goal, as Conare's coordinator once put it, is the 'optimum functioning' of status determination: 'No one who deserves asylum should be deprived of it. And those that don't merit international protection shouldn't be allowed to wrest it'.

[A Conare officer] Because it can happen for both sides, you know? It can be for good or for bad. You can deny for someone that should be entitled or you can't grant it for some who shouldn't.

Of course, examiners are the first to recognize that an absolutely bias-free decision is but an ideal aim. In practice, many will say, it is very hard to avoid that some degree of bias interferes with the judgment they make. As examiners insist, their unique backgrounds give them different leanings when assessing evidence. They can feel more empathy for one asylum seeker and less for another. And, as in every profession, they are exposed to different bureaucratic pressures, according to the agencies in which they work. Yet few if any examiners, I risk saying, would dispute that the interference of psychological and social factors needs to be carefully controlled.

[Conare's coordinator] We have this image of status determination, but we know, of course, that a lot of things that shouldn't interfere end up interfering. That is why we have all these stages. We have Cáritas, we have the civil society, we have our officers making the interviews, we have GEP, discussing the case again, and we have the plenary meeting. The idea is to dilute these things.

As it is hard to avoid bias, examiners are aware of extrinsic factors that might interfere with their rulings. They seek to avoid bias by repeating their assessment again and again. Like the 'good researchers' described by historians of science, examiners 'restrain from imposing their expectations on the image of nature'.¹³² Decisions, I would often hear, '*cannot be made for no reason*'. Rulings must be properly founded on a thorough assessment of legal fit and careful empirical research. As much as possible, the message is that the case must be allowed to speak for itself.

And also, just imagine: it would be kind of stupid, you know? The guy receives the status now in October and then in December Conare realizes that it has to remove it. It wouldn't look nice. It would look like we don't have any criteria or that the judgment was done in a rush. So, we prefer to wait a little longer, so we can be sure.

Examiners are thus always on the lookout for potential sources of error. They aim at reliable rulings, which will not be proved wrong in the long run. Even after a decision has been made, a central concern for them is to make sure the decision process was not corrupted. For many examiners I talked to, the clearer symptom of bias is dissent around cases they see as manifest. If an asylum request that is seen as evidently weak is nevertheless accepted, this is taken as a sign that the determination process has been crooked in some way. Likewise, if the position of the examiner giving the account guides the final ruling, this is taken as a signal that other examiners also noticed the manifested weakness of the claim. This is taken to show, in turn, that the judgment has been clean.

[A Conare officer] Like in this interview I did in Cáritas in Manaus. What happened: I talked to the whole family (a Congolese mother and two sons). They all told basically the same story. And the mother showed me this old newspaper clipping. It was a real newspaper, crimped and everything. And it showed that the rest of her family had been murdered. She brought this proof, like this. What was written in the newspaper was indeed what she had told me. She said that something had happened in her village and it really had happened. In this case, it was fairly easy to decide. They had to be refugees ... they were refugees, all right.

For the Conare officer conducting this interview, a real newspaper, 'crimped and everything', stands for sufficient proof. The pertinence of the asylum

request is deemed evident. The fact that this clearly empirically-strong case is accepted barely needs to be accounted for. In a case like this, the decision can be explained in simple terms. The manifest presence of supporting evidence is deemed enough to explain why the asylum request was accepted. Assent around cases in which the empirical footing is plain is treated as self-explanatory.

Indeed, this assumption is so entrenched that, when asked to comment on decisions on empirically 'evident' cases, examiners would often receive my request with a puzzled look. I could never say if what their faces expressed was surprise for my bizarre question, dismissiveness for its triviality or genuine concern for my mental health. For how couldn't I see why the decision on a clearly weak case had been straightforward? Wasn't it obvious? In cases where the lack of empirical support is clear, the decision is straightforward because the lack of empirical footing is plain. What can be more logical than that?

For examiners, to ask why a decision on an 'evidently weak' case was dismissed didn't seem to make much sense. Now, the reaction was usually very different when I asked examiners to comment on cases in which a request they considered empirically-strong was nevertheless denied. While an examiner's decision on 'evidently-weak' cases was explained in passing or not explained at all, deviations from what an examiner deemed to be the correct decision raised many questions. Mistaken decisions seemed to demand a much more elaborate reply. Prejudice, political agendas, economic interests, plain racism, lack of education and other non-legal and non-empirical factors were quickly identified and used to explain the 'error' made by the other examiners.

The particular form these replies would take varied considerably according to the examiner to whom I talked. Sometimes, the contradicted examiner would turn into a lay psychologist, shifting the register of discussion from the cornerstones of legal fit and empirical support to some sort of psychological diagnosis.

[A case owner] These guys from UNHCR are like doctors without patients, you see? Have you heard this expression, 'doctors without patients'? They are like doctors without patients. It's like they are always looking for someone to save.

Another reaction I came across often consisted in the contradicted examiner turning into a lay sociologist, explaining the wrong decision by reference to social pressures of different kinds – bureaucratic pressures, disputes for funding, a desire to gain authority and so on.

[A Conare officer] So, I'll be very honest; these guys are looking for attention, for money, you know? I'll be very honest. As I told you before: these guys want to bring everybody in. They need to justify their office here.

The next chapters will have more to say about remarks like these: of how the very pragmatic need 'not to look stupid' emerges as a major concern. We will also come back to the topic of consistency in Chapter 4. But, for now, it is the one-sidedness of these accounts to which I want to attend. What I want to highlight is this proclivity to 'shift registers', as sociologists Michael Mulkey and Nigel Gilbert once put it,¹³³ and this ease, to paraphrase Latour, with which examiners weigh success and failure using different scales.¹³⁴ When a case is not 'evident' and the decision goes against their expectations, the cause for this error is sought in psychological or social bias. In turn, a decision on a case that the examiner deems 'evidently weak' barely needs to be accounted for, being justified through reference to the lack of empirical support alone.

British sociologist David Bloor uses the term 'asymmetry' to describe this sort of Janus-faced reasoning, in which truthfulness is taken as intrinsic to the claim while only error is to be explored.¹³⁵ In Bloor's account, asymmetric explanations maintain that if a statement that looks right, smells right and acts right is accepted as right, then the best possible explanation is to entertain the possibility that it actually is right. Otherwise, the fact that so many people accept the statement as right would be a miracle.¹³⁶ Following this reasoning, sociologists are invited to explain what external factors lead to mistakes. If a logically and methodologically sound statement is not accepted as right, or if an unwarranted statement is considered to be right, then this needs to be accounted for. But, as the reasoning goes, there is little to be gained by asking why a decision that is logically and empirically sound is accepted as such.¹³⁷

Weak and Strong Programmes

The science studies toolset adopted in this thesis is heavily indebted to Bloor's effort to extend Wittgenstein's strong indeterminacy thesis into sociology. Taken for granted by many philosophers at Bloor's time was the idea that belief in scientific and logical theses is justified, quite simply, because they are right. Philosophers assumed that scientific and logical knowledge were different from other kinds of belief, like taste and political opinion, which we acquire for motives external to reason. With his remarks on strong indeterminacy, Wittgenstein problematized accounts for knowledge of this sort. Of course we believe that $2+2$ equals 4, Wittgenstein insisted, but *the reason we believe* cannot be the rule of calculus alone. Bloor's insight was to read Wittgenstein's remarks on rule-following as an invitation to sociology.¹³⁸

In the conventional image of knowledge Bloor attacks, there is a context of discovery and there is a context of validation, which must be kept apart. There is the issue of proposing a theory and then there is the different issue of demonstrating that this theory is right or, at least, is the best explanation we have. In this image, it doesn't matter the kinds of factors that influence the theories' genesis. After experts claim a theory is right, they still have to demonstrate that rightness in a manner congenial to logic and the best methodological practices of the day. Sociologists can try to understand what goes on inside the context of discovery. They can try to isolate the 'ethos of science' in these democratic societies or find the sociological causes of error in the authoritarian ones.¹³⁹ But if one wants to understand why what counts as right counts as right, then the answer is to be found in logical reasoning and good method alone. In the academic division of labour encouraged by this demarcation between genesis and justification, understanding what makes scientific and logical theses true is the turf of philosophers – no sociologists required.

To attack this picture, Bloor goes straight to the source – the holiest of holies, mathematics. Drawing on Wittgenstein's remarks on rule-following discussed in Chapter 1, Bloor gets the very basic sentence 'add two' and asks how we learn to react to it. When faced with a basic equation such as '2, 4, 6...', how do we know how to react when someone asks us to 'add two'? Taking his cue from Wittgenstein remarks on rule-following, Bloor tells us that, from a logical point of view, when faced with this situation, there would be as reasonable ground to answer '2, 4, 6, 8, 10...' as there would be to write '2, 4, 6, 2, 2, 2...'.¹⁴⁰

Of course, Bloor is more than aware that one only needs to read these two sequences to know – *to feel* – which one is right. But if the reason behind that feeling is not logical, then this impression of logical necessity, this fact that we feel *compelled* to answer in the first way, is what needs to be accounted for. As Bloor readily remarks, to account for this feeling of logical compulsion goes far beyond a sociology of error. It puts into question the very division of labour between philosophers and sociologists, between genesis and justification. The establishment of certainty itself – the condition of being truth that distinguishes those statements we accept as true – is opened for inquiry.¹⁴¹

Bloor asks why some expert statements are accepted as knowledge by a social group. Considering some of the standard answers given by experts, Bloor tells us to be aware of asymmetric accounts. Asymmetric explanations tend to be circular, he warns. A la Moliere's opiod, which is said to put people to sleep because it is 'dormitive', an account that explains why a theory is accepted right by attributing this to its truth-quality doesn't bring us very far. In fact, it only moves us around in an idle wheel.¹⁴²

My interest in how some decisions on asylum requests are accepted as empirically strong is directly inspired by Bloor's discussion on expert knowledge. I believe his suspicion of asymmetric reasoning is a healthy warning to those interested in how asylum requests are decided. In their talk, many of the examiners I met engaged almost precisely in the kind of one-sided reasoning about which Bloor warns. The same examiners that would venture on psychology and sociology to explain error would resign themselves to a predictable reference to legal fit and empirical support when accounting for a negative decision on a case for which they considered the lack of empirical support to be plain.

A negative consequence of this asymmetric reasoning is that decisions on these straightforward cases are barely accounted for. If a case is deemed to be supported by law and evidence, there is nothing to be gained by asking why it was accepted. Conversely, if the lack of legal fit and empirical support is considered evident, there is no point in dwelling much on why the request was denied. I hope the general structure of this asymmetric reasoning will be familiar by now. The next section unpacks it in finer detail by looking at how asymmetry becomes visible in two examples of examiner's talk.

Shifting registers

We are back at Cáritas's office in Rio, in a crammed office box built from plastic beads and grimy partitions that serves as interview room for Cáritas's eligibility team. Amid the come-and-go of staff and asylum seekers, Mrs H and I meet for the first time. Cáritas's lawyer makes the introduction. He tells me Mrs H used to work at UNHCR. Mrs H is a seasoned examiner, he says, having written

many legal recommendations sent to Conare. 'She will have a lot to teach you'. It is my very first day, so I ask Mrs H about the key challenges I must caution for. I tell her I am curious about how examiners distinguish strong and weak cases. And Mrs H answers freely, sharing her views on Conare and UNHCR.

[Mrs H] What should matter most is always the objective evidence. Because the subjective judgment, you know, you shouldn't try to guess whether the person is telling the truth. The law says that there just needs to be a reasonable chance that the person is fleeing persecution; that should be enough to acknowledge the person as a refugee. Now, this issue of subjective elements is very complicated. As we follow the interviews, there're indeed things about the case that UNHCR will know and that Cáritas will know and Conare simply won't know; the way the person is telling the story, if she is crying or sad ...

From the start, Mrs H puts a lot of weight in her ability to attain a subtle balance between subjective elements and objective evidence to sustain a legal recommendation. In a diplomatic tone, which she will soon drop, Mrs H reminds me that Conare officers have limited contact with asylum seekers. A consequence of this, she suggests, is that their judgments are not always so carefully made. Very subtly, Mrs H is already deploying the terms that will later allow her to characterize divergent opinions as mistakes.

So, for example, if Conare rejected the case because, say, a man says he was a soldier but he doesn't know the kind of weapon he had. For Conare, this shows that this guy wasn't really a soldier. But our work is to analyse the case more deeply. Was this man speaking the language correctly? Is it possible that he actually knows the gun's name, but he doesn't know how to say it in Portuguese?

In this intermediary step, Mrs H centres the discussion on the examiner's ability to follow procedural guidelines. Reading the handbooks discussed in the previous draft, we came across this warning many times: if they are to build a *proper* judgment about an asylum request, examiners ought to put in context eventual inconsistencies in an asylum seeker's narrative. Mrs H seems convinced that, as UNHCR officers spend more time with asylum seekers, their understanding of cases is more profound in that sense. Furthermore, there are many legitimate reasons for why an asylum seeker's narrative might be

perceived as inconsistent. Mrs H describes UNHCR officers as being more aware of these possibilities. The interviews they conduct would then be more attentive to procedural guidelines.

For example, in this Congolese woman's case: she didn't speak Portuguese well. She gave some information that, unfortunately, was later used against her. She gave the information and then we realized that she probably meant other dates and things like this. It was part of our work to show that, no, she wasn't lying, that maybe she didn't say the right dates because she didn't speak the language well, or because she was suffering a trauma – this kind of thing. These are subjective elements, but which can support the case. Unfortunately, Conare officers don't always consider this. They just assumed she was lying. So, this subjective aspect we try to use really only when it supports the case, because leaving it to Conare can easily backfire.

Mrs H is speaking her mind in increasingly explicit terms. She charges Conare officers with jumping to conclusions. They err – she puts it more explicitly now – because they don't attend carefully enough to special circumstances. As in this Congolese woman's case, Conare examiners are charged for not being attentive enough to the trauma and language barrier the asylum seeker might be facing. For that reason, Mrs H defends reference to subjective elements only when it is done in accordance with a tacit criterion of good faith – to consider special circumstances and cultural relativity. For drawing on subjective elements to support a recommendation, she says, 'can easily back-fire'.

Unfortunately, what we see is that, for Conare, if this woman that was raped tells her story and doesn't cry, then she is automatically lying. But we know this is wrong. We know there are cultural differences, different ways of showing grief. Overall her story was perfectly coherent. The dates she gave were all confirmed by the research, the places where she says there were attacks, we know from humanitarian reports that there really were massacres in that city. But, unfortunately, even after UNHCR said, 'Yes, she is a refugee', this was a case that Conare rejected because they decided based on this completely subjective thing. This happens many times. Even when you research the country of origin and this research proves 100% that everything this person says really happened, they conclude that the person is lying. But this opinion is not based on anything solid. So, you know, many times we see cases being rejected by Conare because they can't bother. It just happens. By the law, she should have been recognized. But she wasn't. This is kind of unfair.

Through a subtle nudge in her argument, Mrs H lets asymmetry in. She speaks of her recommendation as being 100% proved by the objective research. She insists that the statements made by the Congolese woman about dates and places were all *checked against reality* and *proved to be true*. The natural question then becomes why the case ended up in refusal. As a reply, Mrs H dismisses the opposing ruling as mistaken. Asymmetrically, she explains the error by pointing to the external, 'purely subjective consideration' behind Conare's position.

To be sure, there are many reasons to take Mrs H's comments at face value. If I were to express judgment at this point, I might as well agree that interviews conducted by Conare are often too brief and not careful enough. But, although I don't claim neutrality, this kind of face value critique is not what I seek to express. More than using my own judgment, I am interested in how those involved in status determination judge: how they decide the rightness of a decision to deny or grant asylum.¹⁴³ And here, when it comes to sustaining her recommendation, Mrs H's account is asymmetric, as ethically desirable as it may sound. Mrs H shifts registers to justify her recommendation and account for Conare's mistake. She jumps from law and evidence to society and psychology to account for the outcome she sees as wrong.



[Picture 5 – The interview room]

An account like Mrs H's brings us quite far from the image of status determination we get from legal texts and procedural handbooks. Asylum hearings are not light conversations and Mrs H doesn't pretend they are. Her account is vivid and sad. It speaks of trauma, of rape, of hope. As a case for a liberal stance towards asylum, Mrs H's argument was one I found easy to accept.

I would feel very different in my encounters with Mr J – a Conare case owner and unblushing apologist of strict immigration rules. As part of the determination procedure, Conare officers conduct their own eligibility interviews. As there is a considerable case backlog, this stage in the procedure is usually behind schedule. So, when the next plenary meeting is close, Conare officers leave their offices in the capital and go out in missions across Brazil. This happens every three months or so. I met Mr J during one of these trips.

We talked mostly about controversial cases. Mr J told me what are for him the usual causes for disagreement in GEP and how he seeks to sustain his recommendations in the face of dissent. Now, looking at our conversation in retrospect, I am tempted to describe my reaction as a loose and unintentional version of what ethnomethodologist Harold Garfinkel once called a 'breaching experiment'; without really realizing it, I acted in our conversation in a way that violated Mr J's expectancies of a background understanding.¹⁴⁴ I was annoyed by what impressed me as xenophobic overtones in Mr J's remarks. So, whenever he made reference to a taken-for-granted understanding of how a decision on asylum requests was established, I made a point to ignore his expectation and asked the very awkward question of what he meant by it.

[Mr J] To decide is basically to check if what the person states – if the things she tells – really happened in her country and whether they fit the law to be an asylum case. So, depending on what the person says, you think what you have to do in the objective research, and then you raise the information and you bring it to be discussed in GEP.

In this remark, Mr J invokes the standard understanding of status determination as the work of assessing the claim's legal fit and empirical support. To decide if a claim for refugee reality is warranted is to check the statements made by the asylum seeker against the reality in the country of origin; it is to consider the

case against the legal definition of refugee; and it is to evaluate the narrative against itself. In these three steps, it would seem, the examiner can check the legal fit, the empirical footing and the internal consistency of the narrative.

[Me] And in a situation like this [when disagreement is strong] what do you do?

[Mr J] In cases like these, when we discuss a lot and don't get an agreement, we send the case to the main meeting as an open case. It goes to the plenary. Then you have this issue of argumentation. It's like I told you: those cases where there is disagreement go to GEP. They go for discussion. We disagree, then, you know, everyone will expose their arguments etc., like that. And it depends on who makes the better argument. When you have doubts about whether the case fits [the legal definition] to be a case of refuge, then it goes straight to GEP, to be discussed. And if the doubt is about the objective elements, we wait and we do more research.

Mr J speaks of dissent. A listener could be convinced by this quote that GEP and plenary meetings are spaces of rational comparison of information and exchange of ideas, where the examiner who builds the best case wins the day. Sooner or later, one could assume, the recommendation that is in better fit with refugee law and better sustained by evidence will be identified. The insistence that divergences can be solved through extra research and cross-argumentation retain the image of asylum requests as a rational enterprise, properly decided in accordance to law and evidence. The recognition that there are cases when examiners don't manage to overcome dissent is immediately followed by the suggestion that not all examiners read law and reality equally well.

[Me] And this extra-research usually convinces other members?

(Mr J) Sometimes it does. Not always. Like this guy's case, for instance. He was from Colombia. I interviewed him and he told me that there were training camps in operation at his home city and he was afraid of being high-jacked. That was in 2010. You see? This is just unlikely. So, the week this guy arrived I did some research at the US's State Department website and there was no report about any camp in that city. But, guess what: the case went on to GEP and the UNHCR's guy kept saying that he had checked his internal reports and that these were in line with what the Colombian guy was saying and so forth. So, it was like, me saying the guy wasn't a refugee and this UNHCR guy saying he was.

In the first comment, we have a politically correct suggestion that divergent legal opinions can be productively reconciled through rational exchange. This image starts to give room here to hints that the dissident UNHCR examiner might be basing his opinion on dubious internal reports. The ability of GEP members to appreciate which case is supported by trustable evidence and the proper interpretation of law is gradually brought into question. The discussion starts to centre on the choice of sources and their relative credibility. Which source should be given priority – UNHCR’s internal reports or the reports by the State Department checked by Mr J? Mr J starts to build his account for why some case examiners disagree with his view.

[Me] You disagreed completely, you mean?

[Mr J] Exactly.

[Me] And did you try to prove you were right?

[Mr J] Well, I went on and checked again if the guy’s arguments were believable [note that the ‘guy’ now is UNHCR’s officer]. The case was discussed in GEP and the UNHCR’s guy kept saying that he had seen these reports, etc. ... that the story made sense. So I went on and took a look at his report and, you know, it was very clear. [Mr J pauses. He lowers his voice] It was very clear, mate. You know? These guys from UNHCR, they really want to bring everybody in ...

Mr J questions the credibility of the UNHCR officer, in what marks an important turn in his reasoning. The focus changes from ‘the Colombian guy’ to ‘the UNHCR guy’. Mr J’s suspicion is not restricted to the existence of FARC camps anymore. The argument is refocused on the issue of how trustable are the UNHCR examiners making use of the evidence. Mr J invokes honesty. He lowers his voice. He is about to say something that, although sincere for him, also risks coming across as too blunt. He will move beyond the limit of what he assumes to be politically correct. We are entering the psycho-social register.

[Me] UNHCR ... ?

[Mr J] Yeah. I’ve seen it, mate, a UNHCR agent going to GEP and saying a lot of bullshit. Because people think, ‘Oww, it’s the United Nations, they can’t make

mistakes', but I saw it man. There was this report prepared by UNHCR's office in Colombia saying like [drawing a small map of Colombia on an A4 sheet], 'These are the main regions where we have problems with the guerrilla', and it said, like, 'The pacific coast, the frontier with Ecuador and the frontier with Venezuela'. The report was saying this, very generally, in the first paragraph. Now [prolonging the word 'now' as he speaks], in the third paragraph, it went on and said where exactly in these regions the problem was. Like, 'It's going on in cities X, Y, Z'. And the city the guy was coming from wasn't mentioned.

But, what happened: the UNHCR officer brought this map to GEP, showing that the city was in one of these problematic regions. The city was highlighted in the map and you could see that it really was in there. But what he didn't say is that the report didn't mention the city. He just quoted the first paragraph saying that the Colombia's Pacific Coast was problematic. He didn't mention the third paragraph. He stood there saying, like, 'Yes, what this asylum seeker is saying is confirmed by what we know about Colombia, but you see? That isn't truth! You see? He misled the committee. The rest of the group voted based on that information. But it was not right. It was a rather generous reading, to say the least. Now, I don't know. I don't know if the guy lied or was just, you know ... though this happened more than once. I'm just saying this is very problematic. Because our circle is very small; we have very few people working in this area. We need to trust each other.

Mr J seems convinced that the UNHCR's officer misled the GEP through an overgenerous reading of the report. Whether this was an unintentional mistake or a blatant lie, Mr J is careful not to say. At least not until his next remark when, plunging further into the psycho-social register, Mr J speaks his mind.

[Mr J] The truth is, if really you want to know, that these guys, [lowering his voice again] well, these guys study like hell. They are like the military in Brazil. They prepare for their whole lives to go to war but they never go to war. These guys are like this. Everyone has Master degrees, PhDs, etc. But what we see is that the great majority of requests in Brazil are denied, that there are very few refugees. Take the Syrians, for example. Is there a clearer example than the Syrians? Lots of Syrians are coming to Brazil. Why? Because they have a support network here already. These guys don't need UNHCR. Who are the Syrians who need UNHCR? The Syrians in Turkey, the Syrians who are in Jordan, in Lebanon, you see? These, OK, but the Syrians in Brazil? So, you see, that is why they vote for asylum. They want to bring everybody in. The more refugees the better, you see, so they will have what to do.

The change of registers in Mr J's discourse is quite clear. We start in the realm of law and evidence and we end up in the much more sombre arena of bias and manipulation. Mr J's account started with a politically correct praise of

disagreement as an opportunity for a healthy exchange of ideas. It closes with a blunt assessment of what he sees as the real source of dissent. As if in a more intimate tone, Mr J shares his suspicions about the UNHCR examiner. He points to social pressures and personal self-interest that would have biased this examiner's call. 'Do you really want to know why he didn't opt for the right ruling?', Mr J essentially asks. 'Then you have to look at this pathological altruism, to his desire to put his Master's and PhD degrees to good use, to the very down-to-earth matter of guaranteeing his job and justifying the existence of UNHCR's office in Brazil.'



[Picture 6 – Waiting for Conare]

When commenting on specific cases, Mrs H and Mr J argue for diametrically opposed outcomes. Their recommendations sound as ethically attractive to me as they are different in content. Despite these differences, however, I suggest that both Mrs H and Mr J's communications have in common this one-sided censure: they rely on law and evidence to justify the superiority of their views while reverting to external factors to explain the error of others. They justify

decisions they agree with as a natural outcome of this legal and empirical footing. And they speak of what they see as a deviation from right decisions as a consequence of social and psychological bias. Both accounts are asymmetric, to borrow Bloor's term. Rehearsing the old division between genesis and justification, they divert our gaze from how a decision to deny or accept a request is established as right to the external factors that cause mistakes.¹⁴⁵ It is for avoiding this asymmetric switch – which diverts the study into a sociology of error – that I wish to argue next.

The examiners regress

How is the distinction between migrants and refugees established during status determination? Judging by Mrs H and Mr J's talk, law and evidence are the cornerstones in which examiners ought to base this call. Compare their suggestions. What do they have in common? Both warn us that cases are not always clear-cut and that falling in error is a constant risk. They insist that Conare should adopt the course of action in better fit with refugee law and better corroborated by evidence. Both are concerned by the fact that this is not always the case. Some decisions are biased. Some decisions are unfair. When the stronger legal recommendation is not accepted as the case's outcome, both Mrs H and Mr J take this as a sign that other examiners have made a mistake. Letting the case's content speak for itself is for both the best way to avoid error. Despite their different political leanings, this is a principle with which both Mrs H and Mr J seem to agree.

So far in this chapter, I have been arguing that there is an asymmetry in the way Mrs H and Mr J account for decisions. In the previous sections, I have sought to make this asymmetry explicit and explored how it becomes visible in their talk. I want now to justify my opinion that we are better off eschewing accounts like these. I will begin by saying why I am convinced that the examiners' use of empirical support as an indicator of credibility is misleading. I spell out the suspicion, at which I have hinted only in passing so far, that this way of accounting for decisions is tautological.

Let me move the narrative into the building of the Justice Ministry in Brasília, where members of the Group for Preparatory Studies consider a list of requests. Mr G's case is discussed: number 45, male, citizen from Pakistan, asking for asylum to escape religious persecution.

Conare's officer, Mrs F, tells other GEP members that many Pakistanis are requesting permission to travel to Brazil as tourists before asking for asylum. This is an indication, she claims, that they are receiving funding for the trip. She takes this to suggest the existence of a terrorist network. She is worried that these networks might take advantage of sporting events in Brazil, such as the FIFA World Cup and the Olympics, to commit attacks. In response, Cáritas's envoy, Mrs N, argues strongly against the generalization. She says that the fact that there might be terrorists among Pakistanis doesn't entitle the GEP to assume that all Pakistanis are potential terrorists. Mrs N argues that the fact that there might be terrorists coming from Pakistan makes it even more important to be careful when processing requests, as there might be genuine refugees among those wrongly identified as terrorists.

Besides the usual suspicion of economic migration, Mr G's case is tied by Mrs F to the existence of a potential terrorist network. A controversy ensues: Cáritas's lawyer rejects the suspicions and recommends the recognition of Mr G's status. The Conare officer insists on denial. She makes reference to Mr G's answers to the request questionnaire and points to a mismatch in his comments during the interviews with Cáritas and the Federal Police. There is disagreement about how reliable is the evidence presented by both officers.

Had the Cáritas lawyer and Conare officer agreed that the evidence was reliable and that Mr G was a terrorist, a negative decision could have been consensual and we would end up with a 'straightforward' case.

Cáritas's lawyer and Conare's officer continue to disagree. Conare says that Mr G is not a refugee. The Cáritas officer is convinced that Mr G is a refugee. Conare's officer claims to have evidence supporting her position. She presents a picture of a man whom she claims to be Mr G wielding a gun. Cáritas's lawyer counters that this image cannot be taken as reliable evidence. She tells other GEP members that the photo was found on a 'Facebook' homepage and that the picture is blurry. She insists that it is not possible to verify if indeed the picture is of Mr G. She tells the GEP that Mr G's fingerprints have been checked and that eventual connections with criminal groups had not been found.

In response, Conare's officer extends her critique. She raises suspicion about the medical clippings and the copy of the passport brought by the applicant. She suggests that the documents look false and questions whether the work of checking fingerprints has been well done. Cáritas's lawyer replies saying that the analysis of credibility made by the Conare officer is fragile. She charges Conare's officer for basing her arguments on a subjective judgment. She argues that the Conare officer is in no position to judge whether the documents are false and insists that no further research has been made to establish their legitimacy. She asks whether the Conare officer isn't biased against Mr G [...]

'Is Mr G a refugee?', 'Is the picture reliable?', 'Has the work of checking fingerprints been well done?' What I want to highlight in this scene is the way in which the controversy moves back. The discussion starts with the issue of whether Mr G is a refugee and it falls back to the issue of how reliable is the evidence collected and whether the interviews have been adequate. The conclusion on whether Mr G is a refugee is conditioned to the conclusion of whether the determination work has been properly conducted.

One of the founding fathers of science studies, British sociologist Harry Collins, developed the concept of 'regress' to capture a formal challenge posed by a seemingly technical controversy like this.¹⁴⁶ Collins developed the concept of regress while dwelling on whether it is possible to assess the strength of a knowledge claim by relying on replication. Imagine an expert who claims to have discovered a new phenomenon. It is intuitive to assume that, if other scientists conduct the same experiment and get to the same results, then this is reason to accept this discovery as correct.

That is why a usual solution to the problem of choosing between conflicting theories is to conduct a cross-test. First we look into these theories for statements in which they contradict each other. Second, we run tests and do research to find out which of these conflicting statements are corroborated. If everything goes according to plan, we should end up with a result that tells which of the competing theories is stronger. For Collins, a technical controversy, like the one around Mr G's case, illustrates that this sort of cross-test might not solve the problem, as, in principle, a committed expert can dodge critiques indefinitely.

Under-determination in asylum decisions

In his *Law, Truth and Reason*, legal theorist Raimo Siltala develops an argument about under-determination in law. As part of a critique of Ronald Dworkin's suggestion that there is always one right answer to every legal case, Siltala discusses how legal theses relate to the empirical evidence gathered around them. His starting point is the notion of holism – the insight that the comparison between legal theses involves more than the immediate issue being discussed. Siltala argues that experts rely on a number of auxiliary theories to build legal recommendation for a case. When adjudicators compare legal recommendations, they are thus comparing this whole group of auxiliary theories, and not just the issue directly at stake. For Siltala, the holist nature of legal choice raises doubts about whether a direct comparison of theses can ever tell us that one of these is definitely less sustained by evidence. The reason for Siltala's suspicion is under-determination. He is convinced that the choice between two legal recommendations is under-determined by the collection of jurisprudence and facts. In principle, he argues that 'no matter how implausible [a legal thesis] might *prima facie* seem, it can always be saved from critique, if some radical enough changes are effected in the frame of legal analysis adopted'.¹⁴⁷

Siltala takes inspiration for his argument from the debate about under-determination in crucial experiments and the impossibility of relying on the comparison of results as an arbiter to choose between theories. This issue emerged as a topic of discussion amid the philosophy of science field, where it is referred to in its contemporary dressing as the Duhem-Quine thesis.¹⁴⁸

The classic example of under-determination caused by holism is found in the work of French philosopher of science Pierre Duhem. To make his point, Duhem tells us a fable in which his expert of choice, an astronomer, proposes an astronomical hypothesis that predicts the trajectory of a celestial body. Duhem's astronomer probes the sky in search of a celestial body, but is frustrated in his work. Duhem's argument is built from the holist insight that, to be able to predict that we shall see this celestial body in a certain coordinate in the sky at a certain moment, the astronomer needs to rely on a series of auxiliary theories (theories about how to calculate the speed and position of other celestial bodies, among others). Under-determination emerges when we develop this holist insight in the suggestion that, even if the astronomer's prediction is falsified by the research (the comet didn't pass at the coordinates anticipated by the astronomer), this failure is still not enough to give a conclusive logical proof that the astronomer's initial hypothesis was wrong.

This is the case because, if the astronomer is committed enough to his theory, he can always redirect blame to the auxiliary assumptions and retain the belief that his initial statement is right. ('It was not my prediction of when and where the comet would be seen that was wrong. It was the theory about how to place the other bodies in space that was wrong. The celestial body went through the place I said it would go through. I just missed it because these misleading auxiliary theories made me point my telescope in the wrong direction').

The under-determination argument is thus twofold: it involves the first holist insight that 'if the phenomenon predicted is not produced, not only is the questioned proposition put in doubt, but also the whole theoretical scaffolding used'¹⁴⁹. And it connects this to an insight about the formal impossibility of arriving at certainty through the suggestion that 'any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system'.¹⁵⁰

Going back to the choice between legal theses having the under-determination argument in mind, I would suggest that Siltala's mention of plausibility hits the nail on the head. For it goes without saying that asylum requests don't sound all equally plausible to examiners. Some requests come across as '100% sustained by research', as the Congolese woman's claim seemed to Mrs H. Others impress examiners as 'rather unlikely'. The mention of different degrees of plausibility is thus a healthy reminder that under-determination is a formal challenge that doesn't necessarily translate into a practical challenge. In the day-to-day tasks of status determination, claims are, of course, not indistinguishable, which we see from the fact that examiners distinguish warranted and unwarranted claims all the time.

Deciding if an asylum request is warranted is far from a straightforward exercise. As experienced professionals, many examiners don't show many qualms to agree that refugee law and evidence are open to different uses. Yet, when it is time to decide, this lofty issue doesn't seem to stand in their way. Some examiners are more prone than others to conceptual discussions. But, as a group, it is fair to say that they don't usually spend much time in abstractions about the ultimately indeterminate nature of their work. Examiners don't stop to deconstruct their logical premises. More often than not, status determination simply moves on. Sooner or later, for each asylum seeker coming through Cáritas's door, we end up with a letter sitting at the fax tray. 'This one is a refugee, this one is not'. That much, examiners seem to be always able to say.

If I seek to extend the under-determination insight to refugee law, this is then not because of its purely logical implications (which would suggest that examiners have no formal basis to dismiss any claim as unwarranted). Instead, I am more interested in the argument's repercussions for social analysis. What I find interesting in the under-determination argument is that it reminds us that the different 'degrees of plausibility' that examiners attribute to asylum requests cannot be so easily attributed to different degrees of legal and evidential support. To put it otherwise, the central question that under-determination encourages me to ask is this: if the amount of legal and evidential support cannot explain why examiners see some claims as *prima facie more plausible than others*, then to what is this perception of different plausibility due? By inviting us to find an answer to this question, the application of the under-determination argument to asylum decisions paves the way to a study of the social practices in which the plausibility of asylum requests is defined. In this light, the question with which we started the chapter can be restated in much stronger terms: if law and evidence cannot by themselves settle whether a claim is to be considered warranted or unwarranted, then what do?

Collins approaches the issue of choice between theories through a study about members of a secluded area in the field of physics: those who specialize in radiation. He tells us that almost all members of the area at one time agreed that this radiation existed in a weak version. They disagreed about the existence of a second and strong form of radiation that would be measurable from Earth. One expert, W, was convinced that this strong radiation existed and that he could measure it. Other critics pointed to problems with W's use of statistics, suggesting that W should have discarded signals as fake and that W had made a mathematical mistake. Collins's insight is to notice that a controversy like this creates a strong case of under-determination.¹⁵¹ The experiment made by W concludes that the phenomenon has been detected. We can take this result as a proof that the apparatus of experts, instruments and statistical techniques put together by W was reliable. In this case, when this apparatus is acknowledged as reliable, accepting its success leads us to the conclusion that strong radiation indeed exists. We can then develop new theories and propose new experiments starting from the assumption that strong radiation exists.

Just as plausibly, however, this result can be taken as an example of a fake measurement, resulting from an unreliable apparatus. If we adopt this assessment, we are led to the conclusion that strong radiation does not exist. If that is the case, the expert community should go on working under the assumption that the world in which we live is one in which strong radiation doesn't exist.

This is the situation that Collins calls the 'experimenters regress': scientists are not sure that they can build a detector. They have to entertain the possibility that they 'might have been fooled into thinking that they now have the recipe for detecting gravity waves'. At the same time, however,

They will have no idea whether they can do it until they try to see if they obtain the correct outcome. But what is the correct outcome? What the correct outcome is depends upon whether there are gravity waves hitting the Earth in detectable fluxes. To find this out we must build a good gravity wave detector and have a look. But we won't know if we have built a good detector until we have tried it and obtained the correct outcome! But we don't know what the correct outcome is until ... and so on ad infinitum.¹⁵²

The parallel between Collins's study of physicists and the controversy around Mr G's case should be plain. In Collins's story, there is the group who believes that the phenomenon is a case of strong radiation and there is the group who believes that the signal isn't a case of strong radiation. In Mr G's case, there is the examiner who is convinced that the asylum seeker is a refugee and the examiner who is convinced that the asylum seeker is not a refugee. In Collins's story, the discussion that was at the beginning about the existence of the phenomenon evolves to a discussion about how reliable the apparatus of examiners is. In Mr G's case, the discussion about whether the asylum seeker is indeed a refugee evolves to a discussion about whether the report is reliable and the examiner trustworthy.

As the discussion progresses, *Cáritas's* lawyer and *Conare's* officer cannot agree on whether Mr G is a refugee or a terrorist because they cannot agree on whether the documents and pictures available are reliable. At the same time, they cannot agree on whether these reports and pictures are reliable because they cannot agree on whether the research has been properly done. We have here the beginning of a regress. In principle, this disagreement had the potential to go on for ages.¹⁵³

The point here is that the possibility of diverting doubt to auxiliary assumptions seems to undercut the possibility of using evidence as an arbiter to choose between acceptance and denial. Like the phenomenon of strong indeterminacy discussed in the last chapter, under-determination implicates that justifications for asylum decisions that point to a lack of empirical support offer no reasonable foundation for denial. As with claims to rule-following, claims to 'action supported by the evidence' become problematic. They cannot account for the negative ruling. Perhaps, a sceptic could argue, examiners arrived at the conclusion that Mr G is not a refugee because they stopped the research too soon and missed reports that would encourage the opposite outcome. Like the persistent astronomer in Duhem's example or the sceptical physicist in Collins's anecdote, a committed sceptic could create doubt about whether the evidence amassed is enough to dismiss Mr G's request.

Being symmetric

As I mentioned at the beginning of the chapter, when discussing how examiners ought to assess a case's strength, UNHCR's *Note on Burden and Standard of Proof* suggests that:

In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.¹⁵⁴

I have been saying that this way of accounting for decisions doesn't hold water. Let me now bring the argument together around this point. Consider Mr G's case again. Suppose the examiners followed UNHCR's instructions and managed to gather evidence around Mr G's request. Let's say that, in light of this evidence, Conare concluded that Mr G's request ought to be denied. The first reason why I think this way of accounting for decisions doesn't hold has to do with the extent to which choice between legal recommendations is under-determined by evidence. As extensive as the evidence collected by Conare might be, it still offers no reasonable basis for denial.

Methodology becomes an issue at this point. What drives me to extend the under-determination insight to asylum decisions is not this purely logical implication, but what it means for how we study status determination. Discussing why we come to accept logical conclusions, Wittgenstein and Bloor are quick to remark that it is a matter of course that the great majority of us will never dispute that 2 plus 2 equals 4. With them, I also hasten to remark that it is a matter of course that some cases will strike examiners as empirically weak. In the majority of cases, this kind of consensual perception will remain unchallenged. Now, if logically speaking, reference to the 'intrinsic weaknesses' of a case cannot account for why it strikes us as weak, then what can? Wittgenstein proposes that understanding why the student feels logically

compelled to answer 4 involves the study of a 'form of life'. In a similar vein, Kripke argues that the reason why we feel compelled to answer 125 when faced with $68+57$ is to be found in the 'assertibility conditions' under which an assertion to be following the rules of mathematics is accepted. Defending his strong programme, Bloor argues that the fact that we feel compelled to accept logical theorems as right is to be found in the training and social norms to which the student is subjected. The practical consequence I take from the argument on under-determination points in a similar (although more practice-focused) direction: to get a sense of why a case strikes us as evidently unfounded, I believe we need to study the social and technical practices in which the case is brought about.

This is where my remarks on under-determination and my critique of asymmetry come together. When an examiner talks asymmetrically and points to external factors to dismiss other assessments of empirical support, this examiner is exploring the possibility of creating doubt, which is opened up by under-determination. This possibility of dissent remains open, however, even when the case is consensually accepted as empirically unsupported. The possibility of creating doubt is never overcome, I want to say, even when all examiners agree that the request evidently lacks legal fit. That is why I am convinced that avoiding asymmetric accounts is so important. By talking asymmetrically, examiners can encourage doubt about other people's views while ignoring the room for doubt in their own. They can charge other examiners for being influenced by external factors, while retaining their aura of objectivity.

Another way of saying this is to compare the argument I am making for symmetry to the argument I made in the last chapter for going beyond weak indeterminacy. I suggested in the last chapter that when examiners distinguish easy cases (which they claim can be decided more or less mechanically by following the law) from hard cases (which they acknowledge as weakly indeterminate), examiners are resorting to a way of speaking – a discursive device – that enables them to constrain the potential impact of strong indeterminacy. My point here is about a similar discursive device: asymmetric

reasoning enables examiners to make a selective use of scepticism and circumvent the continual possibility of doubt about their assessment of empirical support.

To say that a decision to deny asylum is justified because the lack of legal and empirical footing is plain sounds awfully intuitive. Still, it is precisely this intuitiveness – the fact that we feel *logically compelled* to accept the decision – that we need to account for. And when it comes to that, saying that the request was dismissed because it was empirically weak doesn't help very much. This way of accounting for decisions is logically circular; it is tautological. When examiners compare legal recommendations on requests, they are not simply discussing what recommendation is right. They are also *deciding on how to decide* about the pertinence of these theses. Now, if that is the case – if the very criterion to judge what thesis is right is at stake – then how can we hope to learn from examiners what thesis is right? Paraphrasing sociologists of science Harry Collin and Steve Yearley, if the examiners involved in the work do not know how to decide ('and why would they go through all the trouble of exchanging ideas and comparing legal theses if they did?'), then I, the researcher, have no way of knowing how they decide, either.¹⁵⁵ In a situation like this, the very metric I would need to compare the strength of the legal recommendations has not yet been settled.

To bend another of Latour's beautiful phrases, I would make the point like this: contrary to the best intentions of case examiners, the case's content obviously cannot speak for itself.¹⁵⁶ Law and evidence are never self-compelling. They cannot determine the way they are to be used. The characterization of the evidence that will become accepted as an interpretative resource is not given beforehand. It is defined *during* status determination. And this, I suggest, means they cannot be part of an account for why a decision to deny asylum is accepted as right without us falling in a tautology. Historians Yves Gingras and Silvan Schweber put it best, perhaps: 'If one is seeking to investigate the process of construction of knowledge [sic] one cannot seriously invoke the outcome of that process to explain the process itself without going into a circular argument'.¹⁵⁷

A justification of the kind 'the case was dismissed because it lacked empirical support' tells us nothing about how this assessment of empirical weakness came to be accepted. Instead, the absence of empirical support does all the work. Besides being logically circular, it is self-defeating in a very practical way. All that is process-like about a status determination process is lost; determination is retrospectively demoted to the role of a declaratory act. Plainly enough, I think, this sort of account works better as a retrospective rationalization than as an account of how asylum requests are decided in practice.

Scientific work, Latour claims, 'is often made invisible by its own success. [...] When a matter of fact is settled, one need focus only on its inputs and outputs and not on its internal complexity'.¹⁵⁸ Ironically, 'the more science and technology succeed the more opaque and obscure they become'. Status determination is no different, it would seem. Like a printer that works too well, when a negative decision is consensual, it falls prey to its own easiness. It becomes a black box. That is why being earnest in our symmetry (researching cases that are deemed 'evidently unsupported by evidence' to the same extent as we would study the controversial cases) seems necessary when studying asylum decisions. Symmetry saves us from the black-boxing effect of asymmetric talk.

Unboxing Decisions

To decide on an asylum request takes hardware and it takes hard work. Who would deny this? Still, listening to examiners' accounts, we don't hear much about these nuts and bolts. In fact, to press the mechanical metaphor a bit further, the whole middle ground between claim and decision is often treated as one of the many black boxes we come across every day. There is a claim at the beginning and a ruling at the end. As long as weak cases are being dismissed, there is no need to say much about what goes on in between. Of course, how examiners conduct their work becomes important when there are doubts about the ruling. But if what is asked was why a case agreed to be 'weak' is dismissed, then all that happens between claim and decision can be safely ignored. As long as examiners are confident that no mistake has been made, the answer is

considered plain: 'A weak case is rejected because it is weak'. There is hardly anything else to say.

I have been arguing that there are some very good reasons not to treat status determination as a black box, no matter how straightforward a case might seem. For one thing, beyond the trite point that refugee law can be read in different ways, there is a strong sense in which no rule and no set of guidelines can fully constrain how examiners are to decide. In this light, following refugee law is an indeterminate task indeed, all the way down. And to get a sense of how this strong form of indeterminacy is dealt with, we need to open the procedural black box and take a look inside.

Something similar can be said about the empirical fit between the case's content and the decision it is supposed to support. Central to telling refugees from non-refugees is the ability to distinguish strong cases from weak (which are considered so when empirical support seems thin). But here, again, it is hard to see how this presence or lack of empirical support can be demonstrated to justify either negative or positive rulings. When recommendations to accept or deny a request are contrasted, they are compared as wholes. At stake in the assessment of a case is also the issue of whether the evidence is reliable and the determination work has been well done. This, I suggest, opens the door for the possibility of regress and makes the choice between positive and negative recommendations under-determined by the content of the case.

Now, if this is the case – if following refugee law is an indeterminate task and if the choice between recommendations is under-determined by empirical support – then it seems fair to ask how the procedure can so routinely produce results. Formally speaking, disagreements about how to read reports or on what sources to trust are potentially endless. Yet it barely needs saying that these lofty matters have never stopped the determination work. In flagrant disregard of our best critiques, rulings continue to be issued, every six months or so. Confronted with this mismatch, we can insist on giving circular accounts for decisions, or we can move on to look at how these decisions are actively built. By paying close attention to determination practices, this chapter has sought to move us a bit further along this second route.

Asking the question

‘What should matter most is always the objective evidence’. Like this comment, made in passing by Mrs H, many of the examiners’ assumptions about status determination reproduce a sense of discovery around decisions. Rulings are declaratory and not constitutive. If serious, the determination work is objective, impartial and free from error. To be considered competent professionals, examiners cannot let social pressures and feelings interfere with the judgments they make. In its optimum functioning, the procedure must consist of a neutral adjudication of the case’s content. As much as possible, it must mirror reality as it is, reflecting the right reading of the refugee definition and the objective reality in the country of origin. Both in examiners’ speech and in the procedural handbook they use, we come across this idealized image time and again.

Beyond credibility assessment, UNHCR emphasises the importance of ensuring that key refugee law concepts are presented in a balanced and neutral manner, allowing trainees to appreciate their roles as neutral fact-finders and discouraging bias against asylum seekers or any tendency to prejudge asylum claims.¹⁵⁹

‘Neutral fact-finders’ is what examiners are trained to be. A judgment ‘free of bias and preconception’ is what is expected from the status determination work. This idealized picture reinforces the impression of status determination as a purely rational exchange of ideas and the cold blooded gathering of facts. It ignores the essentially rhetorical nature of the determination work. It leaves out of sight all the hardware and the hard work that goes into enacting a case and enrolling support for it. What is worse, by treating assent in evidently unsupported rulings as self-explanatory, this declaratory account not only erases what is process-like about determination processes, it also kills the drive to ask why a decision is accepted as right by making the question sound absurd.

In Chapter 1, I adapted the notion of strong indeterminacy from the science studies toolset and used it to problematize accounts for denial that justify decisions in terms of rule-following. I also highlighted a discursive device that, I believe, enables examiners to circumvent indeterminacy by contrasting cases they accept as complex with cases they insist are ‘more evident’. In this chapter, I

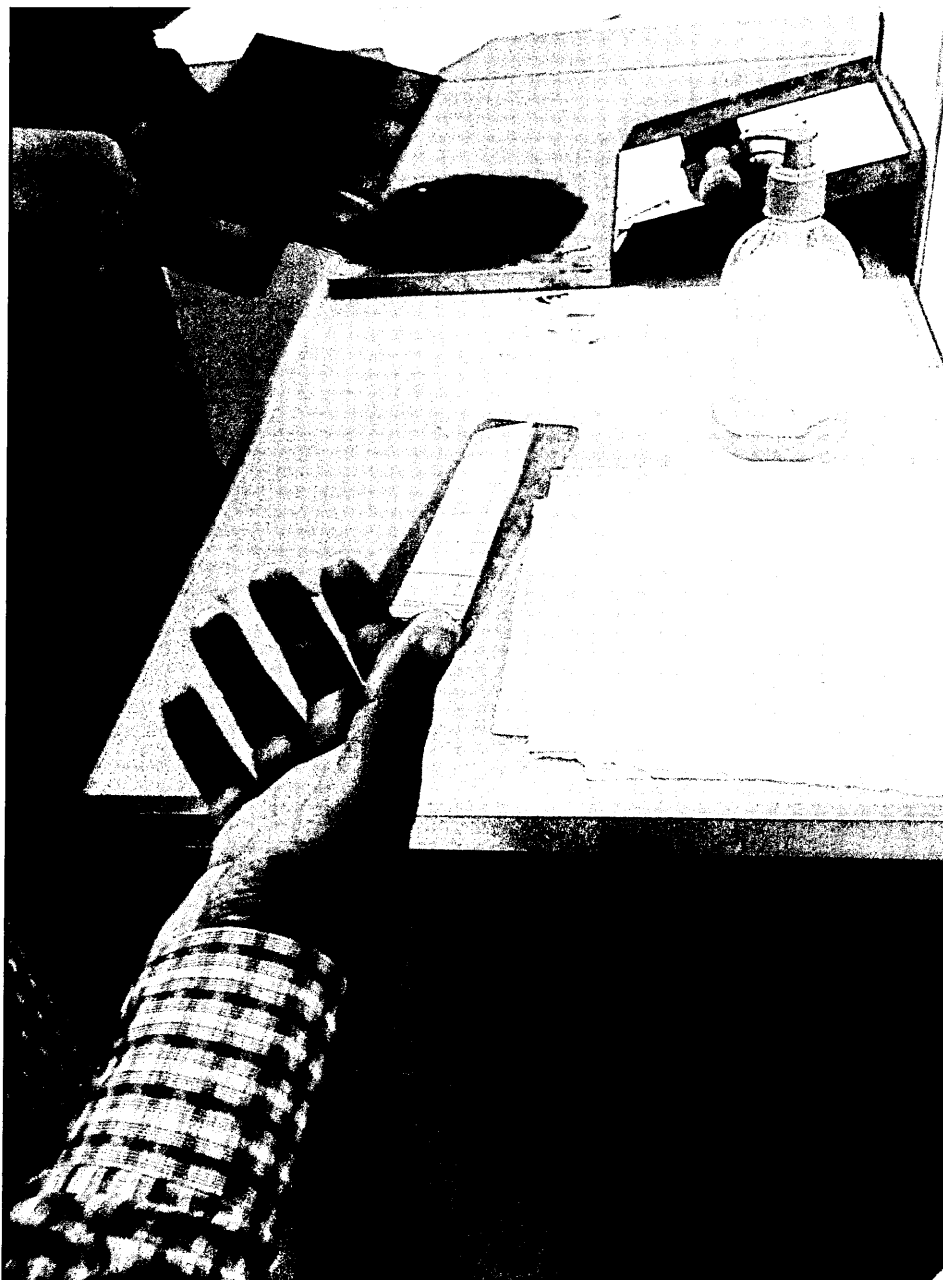
continued the inquiry on how asylum decisions are made by dwelling on a second aspect of this default picture: the idea that it is possible to arrive at a decision by combining the judgment of legal fit with the assessment of empirical support.

Looking specifically at how case examiners account for the decisions they make, I sought to foreground a proclivity in their talk to shift registers between 'law/evidence' and 'social/psychological bias' when accounting for decisions they see as correct and decisions they see as mistaken. Borrowing a term from the science studies field, I used 'asymmetry' to name this way of reasoning, in which truthfulness is taken as intrinsic to the claim while only error is to be explored.

The idea that it is possible to decide by judging legal fit and empirical support is so entrenched that, when a case is deemed to lack these, the decision for denial acquires a quality of logical inevitability as the natural consequence of this lack of legal fit and empirical support. The sociological and psychological factors that interfere with a decision are worth studying when the decision is deemed to be a mistake. But in a case like this, when the lack of legal fit and empirical support is deemed plain, examiners didn't see much point in asking why the request was denied.

This sort of asymmetric reasoning is not only tautological; it is also a methodological shot in the foot. It assumes that the criteria to identify reliable evidence or the proper reading of refugee norms are known beforehand. This, I argued, has the effect of black boxing the determination procedure. The work that goes into rendering a reading as corresponding to law and a humanitarian report as accurate is put out of view.

The practical consequence of this asymmetric trust in legal fit and empirical support is that, in cases deemed straightforward, agreement around decisions is not accounted for. By telling stories that emphasize contingency and heterogeneity, Chapters 3 and 4 will bring the hardware and hard work involved in arriving at decisions back into view.



[Picture 7 - Fingerprinting]

3

Declaring Strength

Judging by the declaratory picture of asylum decisions, the asylum seeker either is or isn't a refugee before the work of status determination starts. If free from error, the asylum decision is supposed to recognize the applicant's anterior condition.

A person is a refugee [...] as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.¹⁶⁰

So far, in this study, I have been encouraging scepticism towards this declaratory way of accounting for asylum decisions. In Chapter 1, I took issue with justifications for denial that point to the absence of legal fit. In Chapter 2, I disputed the assumption that examiners can arrive at a decision by measuring empirical support. This chapter dwells on the implications of the sceptical problems of strong indeterminacy and regress to the understanding of asylum decisions as declaratory.

The first two chapters developed aspects of the science studies toolset that have to do with how we know things. The remaining chapters will rely on insights of the science studies toolset that concern the issue of being – how things exist in the world. I want to discuss how cases *come to be* weak or strong. The idea that asylum decisions are declaratory is the ontological counterpart of claims to rule-following and empirical support. When examiners justify a negative decision by saying that this is what their assessment of legal fit and empirical support demands, they are also making the implicit claim that *there is a pre-existing case* whose legal fit and empirical footing they are assessing. That is the assumption this chapter will problematize.

By encouraging scepticism towards the declaratory picture, Chapters 1 and 2 were meant to encourage the same question: if not how the declaratory picture suggests, then how are cases decided? I closed both chapters by cautioning that the fact that cases are not decided through the assessment of legal fit and empirical support doesn't mean that asylum decisions are discretionary. Asylum cases, I have been suggesting, are not arbitrarily decided on by examiners. To use the term of art in science studies, I could say that cases are *enacted* as weak.

So far, I have been using the notion of enactment without specifying its meaning. This was OK until now, because the image of a case being enacted is self-explanatory, to some extent. There is, however, a particularity about the way the expression is used in science studies, which I now would like to specify. It has to do with the question of 'who does the deed' or, in the case of this study, 'who makes the decision'.¹⁶¹

Discussing the notion of enactment, British sociologist John Law suggests that ethnographers of science are constructivist in a very particular sense:

That is, they argue that scientific knowledge is constructed in scientific practices. [...] The process of building scientific knowledge is also an active matter. It takes work and effort. The argument is that it is wrong to imagine that nature somehow impresses its reality directly on those who study it if they just set aside their own biases.¹⁶²

This, it should be noted, is not at all the same thing as saying it is constructed by scientists. Thus we will see that practices include, and imply, instruments, architectures, texts – indeed a whole range of participants that extend far beyond people.¹⁶³

Taking my cue from Law and other authors in science studies who study ontology as socio-material, I want to advocate a focus on decision-practices that goes beyond the decision-makers. Instead of focusing on the mental state of examiners or the social interests and macro-sociological homologies that explain their dispositions, the notion of enactment is meant to emphasize that this 'doing of the decision' should not be reduced to a deciding subject acting in a decisive event.

Contra the notion that asylum decisions consist of decision-makers disclosing the pre-existing reality of asylum seekers, to talk of an asylum case being enacted is to emphasize the link between the strength the case assumes and the specificity of the practices in which it emerges. An enactment approach helps us move beyond the assumption that the difference between migrant and refugee is settled in 'a decision'. Enacting refugees as different from migrants is not done by a deciding subject in a decisive event. It is the effect of a contingent, highly dispersed and heterogeneous process. That is why it is so important to go beyond the declaratory account.

To develop the argument, I start by describing some of the practices that go into enacting a case in Brazil. I then look at an instance of dissent concerning a request's pre-existing reality and characterize it as an example of a regressible controversy. In conclusion, I spell out how a controversy like this puts in question the image of determination practices declaring the pre-existing reality of the asylum seeker.

Enacting the case

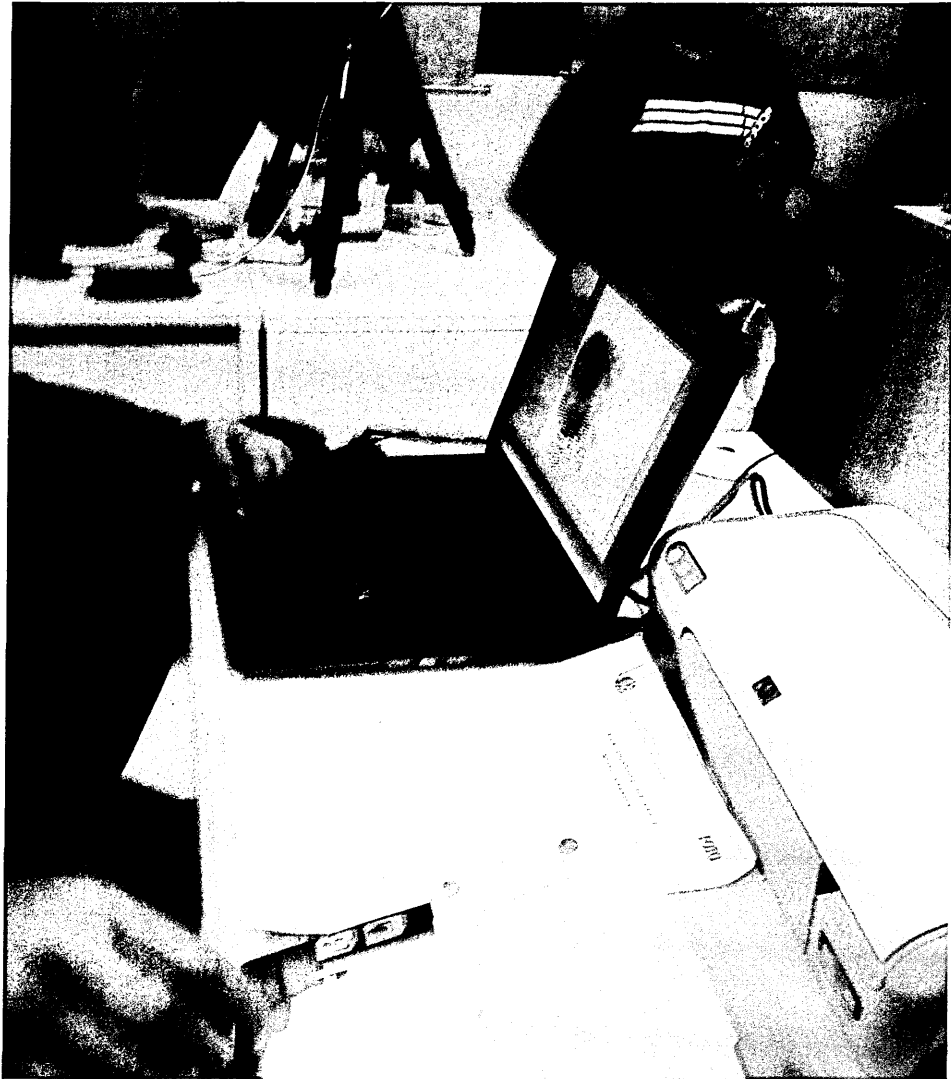
To set the scene for my critique of the declaratory picture, I want to show how what is taken to be the pre-existing reality of the case varies according to the determination practice. Let me move the narrative back to Rio de Janeiro, where we will follow a case through the maze of Brazilian bureaucracy. I start by looking at the work that goes into formalizing a request.

After months working at *Cáritas*, I felt it was time to move beyond its walls. I had come to Brazil to watch the day to day of status determination. I wanted to look at the work of telling migrants from refugees. After *Cáritas*, the Immigration Department was the next practice in the procedural chain. So, when the opportunity came, I followed asylum seekers into the offices of the Federal Police. Sent to these stations to formalize their cases, these men and women were often lost trying to understand what to do and where to go next. When a case was especially sensitive, someone at *Cáritas* was asked to escort the asylum seeker, to avoid delays. I volunteered and ended up playing this role many times.

It is Friday. I stand by the door of the Federal Police in Rio's International Airport. Today I am to escort a Pakistani man while he files his case. A Catholic living in a small city near a Taliban camp, Mr G claims to have been brutally beaten and threatened with death. Leaving his wife and children behind, he has fled to Brazil in haste. He is worried now and wants to be with his family as soon as he can. I meet Mr G at the door and we walk into the station together, where I introduce myself to the clerk sitting at the front desk. I show him the cover letter and copies of the asylum questionnaire completed in Cáritas the day before. As Cáritas's envoy, I am allowed entrance to the restricted area, which is reserved for police officers and governmental personnel. Toddling my way around the maze of office partitions, I follow the signs towards the marshal's room. I shake hands with a secretary inside, who asks me to take a seat. 'The marshal is extremely busy' she says right away. 'You can start the process now. We can take his pictures and collect his fingerprints and have the identification bit done. But I don't think you will get the affidavit today.' Having been dismissed many times before, I know there is no point in insisting. Without much hope, I add my name to the list of names waiting to see the marshal and leave. I walk back to the main hall, where Mr G is waiting for me. From there, I am to escort him to the so called 'identification room'.

My Cáritas credentials allowed me to observe practices that would be foreclosed to most civilians, so I tried to make the most of it. I spent days walking around the labyrinths of office partitions that made up the immigration department in Rio. After some time, I started to develop shortcuts, moving more surely from the front desk to the scrivener's office and the identification room. As a volunteer, I was there to guide asylum seekers through the maze of Brazilian bureaucracy. As a researcher, I sought to attend as closely as possible to the encounters of asylum seekers and the Federal Police.

Despite its pompous name, the 'ID Room' is but another crammed office, where asylum seekers and police officers share space with musty files and dodgy furniture. Standing by the door, a police officer shouts Mr G's name and waves for him to come in. Mr G takes a seat at the chair facing a webcam, while the officer adjusts the camera with her left hand. She takes a picture of Mr G's face and asks for personal details. When the profile is ready, she moves on to the fingerprints. 'Our digital scanner is not working, so we're going to do this old school. First the four fingers on the right hand and no thumb. Then the four fingers on the left hand and no thumb. Then the right and left thumbs, always in this order.' Ink on fingers and fingers on paper, until it is done. 'You can clean up your hands with the towel there.' She points, already walking us to the door. She hands me the hard copy of the fingerprint slabs with the ink still moist. 'Don't lose these', she says. 'He needs them to be identified.'



[Picture 8 - The identification room]

Clerks, forms, laptops, intranets, photographs, ink and paper; and don't forget Mr G's body – his face and fingerprints. At the office of the Federal Police, we come across this small array once again. Through this assemblage, Mr G's sad story and beaten body can be gathered as information about this new object, the formal request, now expected to be looked at and acted upon. Thanks to this small array, what starts at Cáritas as an oral claim – I am a refugee – is gradually materialized as an object of knowledge.

It is hardly a surprise that what I observed in these offices was very different from the straightforward image of the procedure described in handbooks and governmental websites. Reading formal descriptions of the process, one comes across phrases like 'the foreigner shall present himself to the competent authority'¹⁶⁴ and 'the competent authority shall listen to this claimant and prepare an affidavit'.¹⁶⁵ In Rio, the Federal Police stand for this competent authority. But having a request formalized is a much more tortuous process than phrases like these would make it seem. Details as small as the tone with which a question was asked or a particular word used in translation would often make a difference in how cases came to the fore. As the work of taking pictures and collecting fingerprints, the work of asking questions and inscribing answers allowed cases to emerge in very particular ways.

Mr G and I walk back to the station's entry hall. I walk to the clerk and tell him Mr G's story in as shocking terms as I can. I tell him of the blood and broken bones and of Mr G's family still in hiding in Pakistan. I ask him to please make sure the deputy would see us. Three hours later, Mr G and I are called into the deputy's room. Inside the office, a large police officer dressed in an intimidating police parka tells Mr G to take a seat. He asks me to work as translator and immediately takes the lead in the interview. 'What is your date of birth? And what is your father's name? And what is your mother's name? And in which city were you born? Are you married? Is your passport from Pakistan?' The officer poses question after question. Mr G barely has time to breathe. 'OK', the officer says, marking a break in the interview. 'Now tell me the reason you left Pakistan and the reason you are afraid to go back. Just a brief report' [um breve relatozinho], he insists.¹⁶⁶ 'It was because of the Muslim cleric in my city' Mr G answers. 'He was trying to force me to become a Muslim'. The officer, reading out aloud while typing: 'The asylum seeker was called in by the persecutor, who proposed that he become a Muslim'. 'It's more like "demanded"', I intervene. 'He "demanded" more than "proposed"'. The officer, still typing: 'This way is good. You can understand. Go on'.



[Picture 9 - Preparing an affidavit]

After Mr G and I parted company by the door of the police station, I went back to my routine, volunteering at Cáritas during the day and reading articles and writing drafts in the evening. In a distant neighbourhood, deep inside Rio's slum, Mr G went back to his new life, in the house of the Brazilian family that had taken him in. Almost three months went by without us seeing each other, so I was happy to see him again in Cáritas at the day of his eligibility interview. Mr G was still worried about his family. But he also looked less sad, I deemed, already trying his first words in Portuguese.

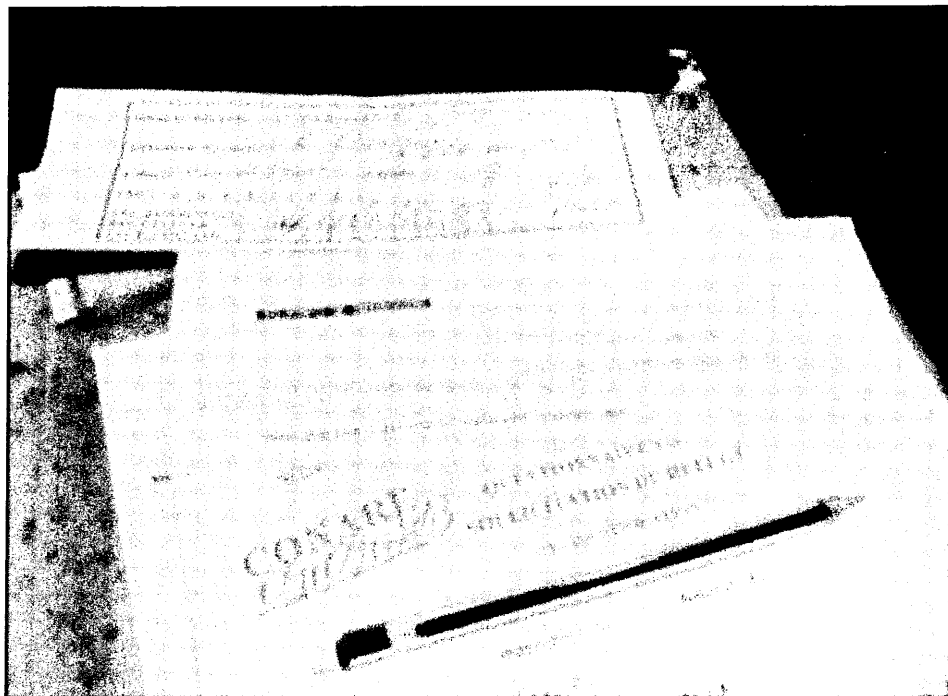
The lawyer: 'So Mr G, let me start by explaining a bit about this process and the steps you will go through. You have been to the police. Now you talk to us. Then you will talk to Conare, then we will do our research and send our recommendation to Brasília, and then Brasília will decide on your case. The whole process takes on average six months. What we are gonna do today is this first eligibility interview. It will be a bit like what you did at the Federal Police, but we are gonna ask you to retell your story in as much detail as you can. You don't need to tell me anything you don't want to. But the more information you can give the better. This will help me make a better report. I might need to ask you some sensitive questions about the things that happened to you. You don't need to answer if you find it too hard. But the more detail you can recall the better. It would help your case.'

At the immigration department of the Federal Police, Mr G's condition as an asylum seeker is made official. At stake is whether Mr G is who he says he is. 'Is Mr G really a Pakistani? Is he wanted by Interpol? Is Mr G, in short, a legitimate asylum seeker, entitled to ask for refuge?' To answer this question, a picture is taken, a profile is prepared and fingerprints are marked as black stains on paper strips. An affidavit is written, which will stand from there on as the official representation of what was said during the interview.

More than to tell the story in detail, the aim of the first meeting was to formalize the request. When Mr G tried to tell his story in as much detail as he could, this behaviour was not well received. At the eligibility hearing, on the other hand, the lawyer is looking for details. Her goal is to assess the internal consistency of Mr G's narrative. In contrast to the case emerging at the marshal's room, the desired outcome is not a summarized version of Mr G's story, but the visualization of his case as an extended transcript.

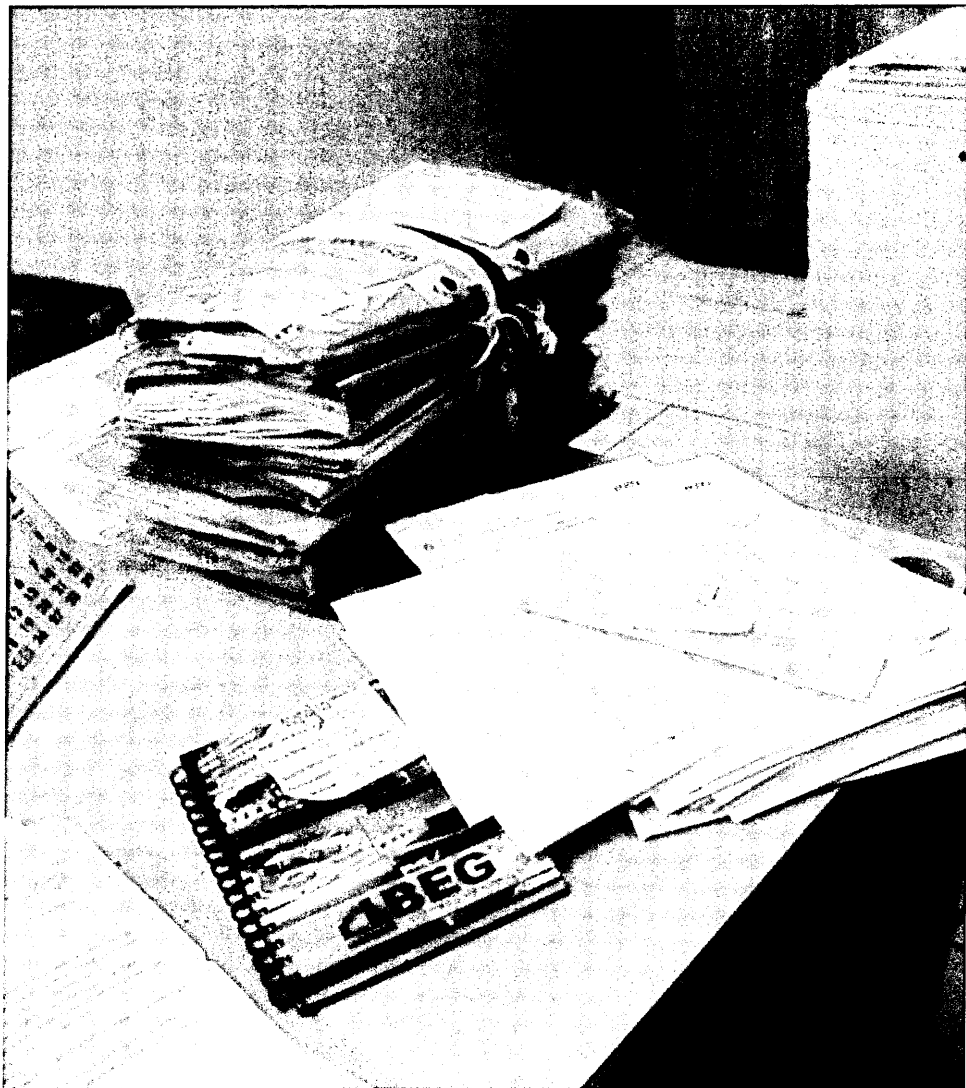
The lawyer: 'So, I would start asking you to please go ahead and tell us what you can about what happened to you. We know a little about the religious persecution that goes on in Pakistan. But at some point, something happened to you in particular that made you want to leave. What exactly happened? What are you afraid of? Why did you have to come to Brazil?'

Mr G: 'Ohhh sir. It started about a year ago. I was praying and this cleric came along with a group and tried to convert me to Islam at gun point. When I said no he said I would regret it. He threatened to kill me and my family. And when I continued to say no, he beat me. Here sir, you can still see the bruises. Here, and here and here. Can you see it? They almost killed me. I have these x-rays by my local hospital showing my injuries, if you want to see them. All these are broken bones. Can you see? Still, even after I went to the police and I showed them this, they kept telling me that there was nothing they could do. They give me this report here, calling it 'an isolated incident'. And they told me to apologize. Can you believe it? So I decided to go to the courts, although that didn't help either. The judge was a radical too, you see? When he finally agreed to see me he just said I was lying. He told me that the cleric was a religious man and that he wouldn't lie. He asked for my passport. The minute the judge saw the word 'dhimmi' (unfaithful) in it I knew I had no chance. Here, take a look. The government prints this 'unfaithful' in our ids. Here. Can you read it?'



[Picture 10 - Inside the file]

Like the work that goes into enacting the case as an affidavit, enacting the case as an extended transcript puts together its own array of people and things. It takes a lawyer asking questions and an interpreter writing answers on a laptop. It takes a medical report with pictures of broken bones and a passport with the word 'dhimmi' marked in it. It takes Mr G, of course – his voice and his gestures. And this is to name just a few of its cogs.



[Picture 11 – Inscribing bodies]

When we look at status determination in such detail, it becomes clear that Mr G's claim only becomes a case after an asylum request questionnaire is filled up, finger prints are collected and interviews are concluded. Before it can be commented upon in legal recommendations, Mr G's stories have to be passed along and marked in affidavits and transcripts. As the determination procedure moves on, his statements will have to be contrasted with more statements harvested from humanitarian reports and United Nations handbooks. And if the Conare members sitting in Brasília are to give a ruling, then all this material will have to be somehow brought back to them, be it through the police station's intranet or Cáritas's old fax machine. For all my talk of making Mr G's case in person, actually putting a case together takes much more than gestures and words.

Disconcertment

The array of heterogeneous elements involved in making individuals visible as asylum seekers is not easy to find. In fact, during the time I spent there, much of the work of Cáritas's staff consisted of finding the police stations where this assemblage was held. Sometimes what was missing was personnel ('the marshal is on vacation', 'the scrivener has been transferred' or 'the deputy is out for lunch'). Other times, the lack was strikingly material ('I cannot print an affidavit because we are out of paper', 'the fingerprint scanner is broken' or 'the intranet is out'). On one occasion, even the electricity was out, and a whole group of asylum seekers remained undocumented while the police station endured a blackout.¹⁶⁷ When the necessary gathering of people and things wasn't available, the work of status determination was brought to a halt.

After months following asylum seekers into police offices, I came across so many of these breakdowns that I began to lose track. I struggled to document as many episodes as I could, writing avidly in the hope of pinning down details while they were still fresh. In time, this allowed me to build my own little archive, which made me happy. As my pile of field notes grew bigger, however, it also made the archive increasingly harder to use, which made me tired. Deciding which aspects of the practices observed were worth reporting and

which could be safely left behind took a lot of time. The most basic instinct to cut down work brought me to question why was I so concerned with telling of these issues in such detail in the first place.



[Picture 12 – A blackout]

From the start, what had brought me to Brazil was a desire to capture the very mundane ways in which the border between migrant and refugee is established. Denying people visibility as asylum seekers due to the lack of personnel and basic material elements certainly felt as deserving a mention in this list. Without the cover letter signed by a Cáritas lawyer and the affidavit signed by the police officer, these men and women were not allowed to move on to the next step in the determination process, which was something they avidly waited for. They couldn't get work permits, nor access the health system, nor put their kids in public schools. Even the small aid of 70 pounds paid by Cáritas was restricted to official cases. For all that, broken scanners and missing scriveners did seem to have rather significant bordering effects.¹⁶⁸

And yet I couldn't help thinking that it was improper, almost disrespectful, to be paying as much attention to questionnaires and fax machines as to asylum seekers' stories and pasts. Listening to their interviews, I was constantly reminded that these men and women had seen the worst the world has to offer. Many endured torture, lost their families and were subjected to all sorts of psychological and physical violence. With this in mind, to sit in my armchair and say that their reality as a refugee was not granted according to their experiences but was rather 'a material and semiotic effect' sounded too academic, too detached a point to make.

As my discomfort grew, it got me asking what the point was in devoting so much time to these ordinary practices, to speak of questionnaires and fingerprint devices with the same interest with which I told of lawyers and police officers. What was my reason to detail these mundane practices and attend to their heterogeneity?

I came back to the research with this question in mind. Instead of dismissing my interest in contingency and heterogeneity as an abstraction, I decided to think with it.¹⁶⁹ I went back to the field of science studies and sought to make sense of what I had seen.

I had gone to Brazil to study *how examiners decide* who is a migrant and who is a refugee. In time, I came to believe that the way I was framing my question was itself misconceived. No matter how much effort I would put into the question, I could not grasp how examiners set the distinction. I would never be able to pin down the decisive moment that I could then subject to critique. And this was for the very simple reason that there was none. There was no set of 'deciders' behind the decision. There was no 'pivotal event' to which it could be traced. Or, better perhaps, there were so many that it made little sense to pick one.

The border between migrant and refugee is the effect not of a decision but of a decentred and heterogeneous process in which the case is enacted as weak. In what remains of the chapter, I spell out how approaching asylum decisions through the science studies lens brought me to think this way.

Why focus on heterogeneity?

In this section, I want to justify why I find it important to focus on heterogeneity and detail. I want to explain my suggestion that each heterogeneous array allows for the emergence of a particular 'pre-existing' reality of the case.

As part of my discussion on under-determination in Chapter 2, I characterized the controversy around Mr G's case as an example of what Collins calls an experimenter's regress. I argued in Chapter 2 that this potential for regress puts in check the possibility of using evidence as an arbiter to choose between the acceptance and denial of an asylum request. The conclusion this was meant to encourage is that justifications for denial that point to a lack of empirical support are logically untenable. I want now to go back to the issue of regress – this time to make sense of the importance I give to detail and heterogeneity. To explain why I find it so important to focus on these, I follow British sociologist John Law in an ontological reading of Collins's argument. With other authors in science studies who approach knowledge-making practices with an eye to heterogeneity, Law argues that regressible controversies do more than raising the question of how a logically unsolvable controversy is brought to an end.¹⁷⁰ According to Law, regressible controversies teach us something about what comes to count as reality as well. That is the ontological spin of the argument on regress that I want to emphasize.

For Collins, what makes a regressible controversy like Mr G's interesting is the fact that it is brought to a closure *despite* its potential for regress. In the controversy about radiation, for instance, Collins is puzzled by the fact that the thesis proposed by scientist W was rejected by the majority of experts. The central question – 'Is this signal a signal of strong radiation?' – was turned into the issue of which apparatus was more reliable. The fact that the controversy is regressible means that there is no bedrock on which examiners can stand to decide which experimental apparatus is more reliable. This, in turn, implies that there is no way to prove conclusively that strong radiation doesn't exist. Notwithstanding, Collins tells us, the thesis of strong radiation *was discarded*. The interesting question for him is, so to speak, a sociological-epistemological

one: if it was not the pre-existing reality of the cosmos that led to the rejection of W's thesis, then what social dynamic did?¹⁷¹

As what counts as the pre-existing reality of the cosmos is itself at stake during the controversy, to claim that the reality of the cosmos closed the controversy would be to fall into a circular reasoning. What counts as the pre-existing reality (whether there are strong waves or not) depends on which experiment is accepted as being more reliable. At the same time, the potential for regress implies that there is always the possibility that we didn't detect the waves because we didn't adopt the proper experiment. There is no way, then, to exclude the possibility that, if we had employed a different experimental assemblage, our conclusion of whether there are or are not gravity waves would be different. If the thesis that 'strong radiation doesn't exist' is accepted, Collins suggests that this is because, for some reason, the particular way of doing the experiment that leads to this conclusion became established as 'the proper way' of doing the experiment. Scientists adopt experimental assemblage 'w' as standard and end up accepting that reality as 'real-w'. The version of reality that becomes accepted as 'how reality really is' is the version of reality that comes out of this particular experimental assemblage – of a particular antenna, a particular way of using statistics, a particular way of reading signal and discarding noise, a particular scientist, trained to work in a particular way. Experiments made with this very particular experimental apparatus tell scientists how the pre-existing reality of the cosmos really is. This image of reality becomes diffused and it becomes accepted that there are no strong radiation waves.

Following Collins's insight on regress, Law maintains that we cannot explain why one of these apparatuses is accepted as more reliable by saying that the reliable apparatus is the one that describes the world. As with Collins, Law takes this as an indication that the decision about which apparatus is more reliable has to be made in some other way. What Law adds to Collins's insight is a stronger emphasis on the coextensive nature of the ontological and epistemological questions. According to Law, Collins showed us that at stake in the disagreement between W and his critics were two questions that could only be answered together: 'Is this apparatus reliable?' and 'Does strong radiation exist?'

The answers to these two questions, Law stresses, are ‘co-extensive’: if we use W’s apparatus, we will come to the conclusion that strong radiation exists. If we use the apparatus favoured by Mr W’s critics, we will come to the conclusion that strong radiation doesn’t exist.

The resolution of the arguments about whose detectors were good ones and whose were bad was an interesting social process. [...] The resolution of these arguments is coextensive with the question of whether gravity waves exist. When it is decided which are the good experiments, it becomes clear whether those which have detected gravity waves or those which have not are the good ones. Thus, whether gravity waves are there to be detected becomes known. On the other hand, once it is known whether they are there to be detected, there is a criterion available to determine whether any particular apparatus is a good one. If there are gravity waves, a good apparatus is one which detects them. If there are no gravity waves, the good experiments are those which have not detected them. Thus, the definition of what counts as a good gravity wave detector, and the resolution of the question of whether gravity waves exist, are congruent [...].¹⁷²

This is the key ontological insight to which Law wants us to attend. According to the experimental apparatus we favour, Law notes, we end up with a corresponding ‘pre-existing reality’ of the cosmos. Depending on which experimental apparatus is employed to perform the experiment, we end up with a different conclusion about whether the phenomenon exists. To bend a phrase, different ways of performing the experiment lead to different versions of what is taken to be the pre-existing reality. We end up with different enactments of the cosmos, so to speak: one in which strong radiation exists and one in which it doesn’t.

That is the ontological spin of Collins’s notion of regress that I want to connect to Mr G’s case. In Mr G’s case, depending on whether the image on Facebook of a man wielding a gun is taken to be of Mr G, or whether the medical reports are accepted as believable, or whether the copy of Mr G’s passport is accepted as reliable, we end up with different ‘pre-existing’ realities for the case. If the gathering of evidence and statements is organized as Cáritas’s representative proposes, we end up with a ‘pre-existing’ reality that tells that Mr G is a refugee. On the other hand, if these dots are connected as Conare’s

representative defends, we end up with a pre-existing reality in which Mr G is not a refugee. The decision on which arrangement to rely on and which conclusion to accepted are co-extensive, to borrow Collins's term.

When we connect this insight back to the controversy around Mr G's case, we get a much stronger sense of why the default picture of status determination as declaratory is misleading. What changes when we start to treat determination practices as enacting instead of 'declaring' the pre-existing strength of the case is that the list of conditions for the veracity of Mr G's claim is brought into view. In GEP, Conare's officer is stating that she has looked into report-X, she has done the interview in the way-X, she has checked the legal texts x-1, x-2 and x-3 and ... she has concluded that Mr G is not a refugee. In this way of speaking, the *ceteris paribus* clause '...' that goes unsaid is the revealing statement, 'If we use this same apparatus, we will conclude that'.

That, I believe, is why paying attention to the heterogeneity of determination practices is so important. The particular determination practices through which knowledge about the case is produced is responsible for the enactment of the specific external reality attributed to this case. The specific apparatus of legal texts, the ways of doing the interview, the pictures and the medical reports allow for the enactment of a specific 'pre-existing' reality of Mr G's case.

The practical consequence this enactment approach has for how we account for asylum decisions is twofold: first, if it becomes accepted that Mr G is not a refugee, this cannot be attributed to the pre-existing strength of the case. Justifying a negative decision by saying, 'This is the right conclusion because our assessments of legal fit and empirical support have shown that Mr G is not a refugee' ceases to be an option. As Law puts it, 'It is wrong to imagine that nature somehow impresses its reality directly on those who study it if they just set aside their own biases'.¹⁷³ It is not the pre-existing reality out there that the determination work declares, but the enactment of this pre-existing reality put together *in* the determination practices. Examiners might believe that they are declaring the pre-existing reality of the case, but the pre-existing reality they declare is one of the many ways in which Mr G's case could have been enacted.

Entailed by the concept of enactment is the idea that each assessment practice – the specific assemblage of techniques used, of materials present, of actors involved – not only contributes to disclose the case's strength. The apparatus put together in a determination practice and used to assess whether the case is weak or strong is tied to a unique version of what comes to count as the anterior reality of this case.

Secondly, looking at status determination as enactment also shows us why pointing to this lack of legal and empirical foundations for decisions is not necessarily to suggest that the asylum decision is a discretionary act. To question the idea that the right decisions emanate from the anterior reality of the case is not at all the same as saying it is decided by the examiners, as if they were the incarnation of petty sovereigns. Instead, this pre-existing reality – the 'anterior' condition of Mr G as either being or not being a refugee – is the result of the very concrete work of making a particular determination apparatus – of law books, of a way of doing the eligibility interview, of particular humanitarian reports, and so forth – become accepted as the go-to apparatus to answer the question of whether Mr G is a refugee.

No matter how well-conducted status determination is deemed to be, determination practices never simply disclose the case's pre-existing strength. On the other hand, to say that the case is brought to a closure not by its pre-existing reality isn't the same as saying that examiners decide. The alternative of law and evidence doesn't need to be discretion. Instead of studying the mental state of examiners or the sociological homologues that explain their dispositions, this enactment approach requires attention to the details of the practices in which cases emerge.

Status determination as enactment work

According to the default picture of status determination, the reality of the asylum seeker as a migrant or as a refugee is set prior to the determination work.

A person does not become a refugee by virtue of a recognition decision by the host country or UNHCR, but is recognized because he or she is a refugee. In other words, the recognition decision is declaratory: it acknowledges and formally confirms that the individual concerned is a refugee.¹⁷⁴

To speak of the asylum decision as declaratory is to presume the anterior nature of this reality. If free from error, the process will *recognize* the pre-existing strength of the case. The asylum decision consists in disclosing this anterior reality, which dictates whether the asylum seeker must or must not be recognized as a refugee.

In this chapter I took issue with the characterization of asylum decisions as declaratory. My contention is that what counts as the case's pre-existing strength is not so simply brought out *by* the determination practices; rather, it emerges *in* these determination practices. To express what I mean by this misleadingly trivial differentiation, I borrowed the term 'enactment' from the science studies literature.

Moving away from the picture of asylum decision as declaratory, I stressed here that the strength of the case, the reliability of evidence and the competence of examiners are simultaneously negotiated. In Law's words, 'none comes first. Reality isn't destiny [...] Indeed it only appeared in the course of scientific experiments'.¹⁷⁵ As intuitive as the picture of asylum decisions declaring a pre-existing reality might be, cases like Mr G's teach us that 'in practice, such realities depend on the particular practices from which they emerge'.¹⁷⁶

Realities are made in practice. That is how Law phrases it. Clarifying and developing this insight has been a key stake for the study so far. If we understand this misleadingly trivial statement, it becomes easier to understand what is at stake in the break from a declaratory to an enactment approach to asylum decisions. The insight of regress not only encourages us to break with asymmetric accounts; taking it to fruition also encourages us to look at these determination practices in a fresh way: not as declaratory practices, which discloses the case's strength, but as practices that *enact* the case, in the strongest possible sense of the word.

In his now classic *Changing Order*, Collins suggests that the perceptions we form about the world are like shapes we draw in dot paper. The world, Collins tells us, 'is there in the form of the paper, but mankind can put the numbers wherever it wishes and in this way can produce any picture'.¹⁷⁷

I believe the same can be said about the way asylum cases are assembled. The stories asylum seekers tell during interviews, the humanitarian reports and the evidence asylum seekers bring with them – these are all there as dots on paper. But more than one picture can be formed by connecting them. There is more than one way, I want to say, of *enacting* the ‘pre-existing reality of the case’. Depending on the particular way this pre-existing reality is enacted, we arrive at different conclusions concerning whether the person is a refugee.

To describe asylum decisions as declaratory is thus misleading in that sense. Determination practices do not simply *declare* the case’s pre-existing reality. Instead, it is during these practices that what will be later accepted as the case’s ‘pre-existing reality’ is defined. To talk of the cases being enacted as weak instead of being declared weak is to emphasize the link between the strength the case assumes and the particularities of the practices within which it is shaped.

PROCEDURES FOR REQUESTING REFUGEE

Appear before the Department of Federal Police and explain the reasons that made you leave your country of origin.

The Department of Federal Police will carry out the Term of Declarations.

Go to Caritas of the Archdiocese of São Paulo to receive instructions concerning:

Fill out the request for refuge questionnaire;

Social Service instructions for referrals in the areas of housing, health, education and use of other community resources;

Interview with Caritas/UNHCR/OAB agreement lawyers to prepare their ruling, which will be sent to the UNHCR and to the Caritas representative for use in analyzing the case at the CONARE meeting;

Interview with the CONARE representative;

Receiving of CONARE authorization for temporary protocol.

Issuance of temporary protocol by the Department of Federal Police.

Issuance of temporary C.T.P.S. by the Regional Labor Office.

Issuance of Cadastro de Pessoas Físicas (CPF).

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[Picture 13 – A checklist]

Judging Consistency

Consistency is a key concept in the declaratory picture of status determination. Along with the assessment of legal fit and empirical support, the judgment of consistency is one of the main indicators on which examiners rely to decide requests. The perceived consistency of the asylum seeker's narrative is taken as a reliable indicator of the case's overall strength.

[An examiners' handbook] Consistency [...] is understood to comprise a lack of discrepancies, contradictions and variations in the material facts asserted by the applicant [...] The use of the indicator "consistency" is based on an assumption that a person who is lying is likely to be inconsistent in his or her testimony, presumably because it is considered difficult to remember and sustain a fabricated story; and/or when challenged, it is assumed that individuals who are not telling the truth try to conceal their inconsistencies by altering the facts. The converse supposition appears to be that if applicants actually experienced the events they recount, and are genuine in their statements, then they will broadly be able to recall these events and related facts accurately and consistently¹⁷⁸

In Chapters 1 and 2, I relied on the notions of strong indeterminacy and regress to dispute justifications for denial in terms of legal fit and empirical support. Chapter 3 sought to justify the importance of attending to the detail and heterogeneity of determination practices. This chapter continues the work of disassembling and reassembling asylum decisions by taking issue with the use of consistency as an indicator of credibility.

I argue here that the idea that it is possible to assess a case's strength by relying on a judgment of consistency is dependent on a misleading assumption that determination practices are looking at a singular case. If the versions of the case emerging from different practices proved to be consistent, I contend, this can't be written off as a natural consequence of 'different practices exploring the same request'. As an alternative to this consistency-minded, check-box way of thinking, this chapter revisits the relation among determination practices using

an enactment approach. Drawing on the science studies toolset, I adapt the notion of ontological coordination to discuss how different enactments of a case are arranged.

Step by step

'Appear before the Federal Police', 'Go to Cáritas', 'Talk to Conare'. It first occurred to me that something is off with this checklist during a meeting with examiners in São Paulo. I had been working as a volunteer in Rio for months, driving asylum seekers from all over the world from Cáritas's office in Tijuca to police stations in Galeão and Niterói. What I had seen in Rio had strengthened my doubts about how examiners tell migrants from the 'genuine' refugees. I hoped that learning about the procedure in another city would make the particularities of what I was seeing in Rio more distinct. I expected the work in São Paulo to be neither identical nor completely different from what I had been observing. That would give me the sort of partial overlap for which I was aiming. So I asked my contact in Cáritas if he would put me in contact with his Paulista counterpart. After a few weeks of arrangements, I started my field trip.



[Picture 14 – Cáritas-SP]

During the time I spent in Rio, I had the opportunity to talk to many examiners and ended up developing a basic opening line. I would ask the examiners to imagine I was a foreigner and explain the procedure to me. The answer I learned to expect came usually in the format of this checklist. Examiners would list the steps in the procedure and then tell me more about their involvement. As I assumed I had a good understanding of the procedure already, I asked for this overview mainly as a conversation starter. The idea was to get the examiners talking and make up more questions from what they said. But the answer I was given in São Paulo really surprised me.

[Mrs T] Well, if you want the official checklist you can read this leaflet in your folder. We give it to asylum seekers when they first get here. It lists all the steps. 'The process starts at the police, then you come here to talk to us, and then the Conare agent comes down and so forth and so on'. Now, of course, you have to take this with a pinch of salt. Because officially the person only becomes an asylum seeker after formalizing the request at the Federal Police, but in practice what happens is that the process usually starts here. 'Cause, as you know, we now have a waiting time of about six months before the foreigner gets to do the affidavit at the police. And, of course, during this time this person will have been here already. He will have told us a bit of his story and so forth, and will already be talking to our social workers and getting some help. So although the process can only be considered official after the person has gone through the fingerprinting etc., here at Cáritas the person already is an asylum seeker long before that.

What struck me as unusual in Mrs T's way of describing the procedure was more the idea of asylum seekers having different practical realities than the contrast between 'the real world' versus 'in theory'. That a checklist doesn't represent the messiness of practices can hardly be news to those involved in the work. Even the most ivory tower-entrenched expert would assume that the transition from step to step is likely to be less smooth than this sort of checklist makes it seem. Cases don't follow a standard line. Examiners don't know when hearings will take place. In practice, the procedure is complicated, of course. Although this situation says a lot about the transparency of the determination procedure in Brazil, Mrs T's contrast between official description and the work in practice was one I had come to expect. Her talk of a foreigner having different realities in different practices, on the other hand, really gave me pause.

While writing about the practices I observed in Rio, I struggled to make sense of why I was finding it so important to write about their heterogeneity in detail. I took the notion of enactment from science studies to insist that status determination allows for the emergence of a particular version of the case. Now, looking at the relation between practices in enactment terms, I worried that I was being bewitched by my own terminology. But here I had it: an examiner, talking of a foreigner at the same time being and not being an asylum seeker, as if it were the most ordinary notion in the world.



[Picture 15 – Being an asylum seeker]

The person can only be said to be an asylum seeker after fingerprints have been collected and an affidavit has been written. In São Paulo, foreigners usually wait six months to have access to these practices at the Federal Police. *But here at Cáritas, talking to our social workers, the person already is an asylum seeker long before that.* ‘Here and there.’ ‘Now and then.’ The notion of a same foreigner oscillating in status disconcerted me. I had listened to the procedure

being described as a checklist so many times that I came to assume a continuous progression: from foreigner to asylum seeker and from asylum seeker to refugee or failed applicant. Listening to Mrs T speak of a foreigner's reality as something that changes from site to site was encouraging in that sense. It made me realize that the versions of the case enacted in different practices can hang together in ways that are much less coherent than the image of a status-to-status progression imbued in my checklist.

Hanging together

I got the image of different versions of the case *hanging together* from the Dutch philosopher Annemarie Mol. Coordination is the more formal term Mol uses to speak about this. Listening to the examiner in São Paulo taking issue with the checklist overview made me confident that studying determination practices as enactment wouldn't be a lofty endeavour. But I doubt I would have taken these critiques so seriously if I hadn't been sensitized by Mol to think of reality as a local achievement. With Michel Callon, Bruno Latour, John Law, among other authors, Mol is part of a small group of scholars in science studies who study knowledge practices with an eye to contingency and heterogeneity. I read Mol's *The Body Multiple* early on my research and her arguments on coordination stayed with me.¹⁷⁹

Mol is a philosopher who spent many years studying diagnostic practices in medicine. Like status determination, the practices she studies are supposed to assess a person's *fit* with a certain definition. Is this patient anaemic? Is this a patient suffering from atherosclerosis in her foot? Like status determination, Mol tells us that producing an answer to these questions takes a lot of work. Each area of the hospital has its own saying. Each practice brings its own diagnostic standard, its own instruments and diagnostic techniques. In her terminology, Mol tells us that each of these practices enacts a particular reality of the disease. In practice, she says, a disease like atherosclerosis is multiple. It is enacted in multiple ways. And Mol insists that if these multiple enactments can be treated as manifestations of a single condition, then this is the result of coordination. Singularity is not given by the order of things.

Ontological Coordination

Mol's argument on coordination can be described as a study on the relation between different 'diagnostic apparatuses' – something like the experimental apparatus used by the physicists mentioned in the last chapters. As discussed in Chapter 3, John Law gives an ontological spin to Collins's insight of regress and argues that we might end up with a cosmos in which strong radiation exists or doesn't exist depending on the experimental apparatus experts use. The choice of the cosmos' reality and the choice of the experimental apparatus used to study this reality are 'co-extensive', as Collins and Law put it. Likewise, the idea that the reality of the disease being diagnosed is not disclosed by diagnostic practices but rather enacted in them is the starting point of Mol's argument on ontological coordination. 'Reality does not precede the mundane practices in which we interact with it', she writes, 'but is rather shaped within these practices'.¹⁸⁰

In her work, Mol experimented with many words to express what this shaping is about. In earlier works, we find her talking about doing and performing. To make a stand in the feminist literature with which she engages, she adopted the notion of enactment.¹⁸¹ Mol's most distinctive argument is not about enactment, however, but about the co-existence of multiple enactments. That is what her discussion on coordination is about.

Think of a patient entering a hospital and going through a series of diagnostic practices. When this patient leaves the hospital, her discharge letters read that she has been diagnosed with atherosclerosis on her lower limb. Mol insists that each of the diagnostic practices this patient went through did more than examine the patient from a different perspective. Faithful to the enactment principles, Mol shows how each of these diagnostic practices allows for the emergence of a unique reality of the condition from which this patient is suffering. Sliced and put under the microscope in the haematology lab, for example, the reality of atherosclerosis is that of a thickened blood vessel. In the radiology department, the reality of atherosclerosis is that of a shadowgraph. Strictly speaking, the atherosclerosis these two practices are enacting is not the same. And yet, in the patient chart and the discharge letter these multiple ways of enacting atherosclerosis are reduced to different manifestations of the same disease.

This is the puzzle with which Mol is interested: this oscillation between multiplicity in practice and singularity in the way that doctors talk about and deal with the disease. What makes this oscillation possible, Mol claims, is the work of ontological coordination.¹⁸² The enactment insight breaks with the idea that our reality is anterior and independent of the practices that bring them about. The notion of coordination, in turn, breaks with the idea that the *singularity* of the objects we study is anterior to the practices in which that singularity emerges. A patient enters into a hospital with a complaint. She goes through a series of diagnostic practices. At the end of the day, she gets out of the hospital carrying a letter saying she suffers from atherosclerosis. What Mol is telling us is this: this singular diagnosis is never given by the order of things. It is always brought about. Singularity is contingent. It needs to be enacted itself.

The questions that practitioners try to answer are, of course, not identical in status determination and in medical decision making. Whether the diagnostic emerging from different practices is consistent is not always relevant for the doctor's decision on how to treat the patient. As long as the two diagnostics ask for the same treatment, whether they are consistent or not is a secondary concern for the doctor. This makes medical decision making different from status determination, in which the judgment of consistency is a central concern. Yet, although it is important not to downplay their particularities, the two decision-making processes also have more in common than one might assume. Like the work of diagnosing a disease, the work of determination status is complex. It involves a myriad of determination practices: from the collection of fingerprints to the ruling at the plenary meeting. Each of these practices puts together its own array of humans and things. Each relies on its own standards of what qualifies a strong claim and its own techniques for producing information. As with the medical objects Mol studies, asylum cases are multiple in practice.

What Mol encourages us to do is reconsider the relation between these multiple enactments beyond the linear progression that checklist thinking leads us to expect. As different diagnostic practices are not complementary ways of bringing out a same underlying condition, different practices are not just steps in the assessment of the same and singular underlying case. Determination practices do more than approach the same underlying case from different perspectives. They enact different realities for the case. And, following Mol's advice, I would suggest that if these enactments somehow align and allow for a consensual decision, then this alignment needs to be accounted for.

At the Federal Police, a very specific array of officers, interpreters and interview techniques allows for the emergence of the case as an affidavit. At the interview room in *Cáritas*, questions are posed in a tone that invites details, medical reports are added to a folder and the case emerges as an extended transcript. We can look at these practices as boxes to be checked in the assessment of the case, or steps in the path towards the final decision. Or we can look at status determination with an enactment gaze.

Beyond the wordplay, an enactment way of studying the relation between these practices entails the denaturalization of the alignment between their outcomes. In an enactment approach, agreement between different enactments of the case emerging at different practices can't be written off as a natural consequence of the presumed fact that 'different practices are bottom line exploring the same and singular case'.

Lost on the way

To illustrate how attention to multiplicity and coordination destabilize the use of consistency as a decision criterion, let me move the narrative back to my fieldtrip. After leaving Sao Paulo, I asked my contact in Rio to arrange meetings for me at Cáritas's sister agency in Brasilia, IMDH. My suspicion of check-list overviews was strengthened by the stories I heard there.

At that point in the research, I was in the process of writing my critique of accounts for decision that resort to empirical support, which I report in Chapter 2. The need for symmetry when studying decisions on complex and 'more evident' cases was very much in my mind. What I had read about rule following and under-determination had made me rather sceptical about the possibility of using law and evidence as arbiters to choose between competing recommendations. So, whenever examiners mentioned strong and weak claims, I made a point of interrupting them and asking them to justify this contrast. How, I would ask, could they tell the difference? What was the standard they used?

The notion of consistency came up often in the answers I got:

[Brief 1] Mr X, Syrian, requesting asylum to escape generalized human rights violations. The asylum seeker's credibility has been satisfactorily established. The asylum seeker offered enough details of events and showed calm, tranquillity and conviction when reporting his story. His narrative has been consistent across the affidavit prepared at the Federal Police and the asylum request questionnaire filled up at Cáritas. There are no reasons to doubt his motivations to ask for asylum. Ruling: positive.

[Brief 2] Mr E, Bangladeshi, requesting asylum to escape political persecution. The asylum seeker lacks credibility. The statements made by the asylum seeker in his asylum request questionnaire are inconsistent with the story reported at IMDH and the Federal Police. There are reasons to believe the asylum seeker omitted information about the events that led him to leave Bangladesh. During the interview, the asylum seeker seems to have been directed in his answers and oscillated in his description of events. There are reasons to suspect his credibility and to question his motivations to ask for refuge. Ruling: negative.

The briefs above are excerpts of plenary rulings to which I had access during my time in Brasília. In brief 1, the case enacted at the Federal Police as an affidavit and the case enacted in Cáritas as a questionnaire are compared and agree with each other. The versions of the case fit consistently. The claim's credibility is reinforced. In brief 2, the case as affidavit and the case as questionnaire are bridged again, but this time the two enactments don't cohere. The asylum seeker's credibility is put in question and the case comes across as weak. Described in terms of validity or correctness, the reference to consistency across practices often figured in the answers I received when I asked examiners about their criteria for telling strong from weak claims.

At my last day in Brasília, I interviewed a social worker, Mrs K, and asked her opinion about the use of consistency as an indicator of credibility. Her insistence on localizing the applicant's status in terms of 'here and there' resonated with what I had heard in São Paulo. 'Of course', Mrs K answered, 'if an asylum seeker tells a story at the police and another story here, then we will need to understand what is going on. But still, I have learned that there's just so much you can take from this'.

[Mrs K] Like in this case I got involved with a few months ago: a young boy, Mr E, from Bangladesh. He got here with a group of six other men. They entered Brazil through Bolivia and asked for asylum when they got here. They did the interview at the police and all made some very vague comments ... about the economic situation in Bangladesh and so on. All very general, you see? And when our lawyer interviewed them, they said pretty much the same thing. They said they had come to Brazil because they needed to work ... because their country was very poor. So you see? When you ask what happened and the person keeps saying, like 'oh, I didn't have a job, I am poor, etc.', we try to help, but it is very likely that the request will be

dismissed. And, indeed: GEP did a recommendation, saying that it saw no well-founded fear; that it looked like economic migration and so on.

Luckily, we work with eligibility but we work with migrants as well. We give aid to migrants in other dimensions: the social, the physical, the psychological. If the migrant has a health problem or needs pocket money he can come here and we try to help. And that is what happened with this boy. This boy came back here after his process, telling us that he needed money and that he needed a job. So we booked him an appointment with our social worker to assess his needs. And again, at first he pretty much repeated what he had said at the hearing. Just this time we went on asking for other things. He ended-up explaining that he wanted a job because he needed to send money to his wife and his children, who were starving in Bangladesh. We asked how come and he told us, 'Oh, it is because they have been expelled from our house'. When we asked why he said, 'Oh, it is because my house has been burned down'. And we asked what happened and he said, 'Oh, it's because my enemies burned down the house'.

'But which enemies?' ... and he kept going ... and we let him speak ... 'Oh, it was this and that'. And it so happens that, though his case wasn't about politics, it qualified as religious persecution.

In Mrs K's story, a young Bangladeshi arrives at IMDH office and fills out a questionnaire. A police officer asks questions and prints an affidavit. IMDH's lawyers and Conare officers ask more questions and write their legal views. At GEP and the plenary meeting, the multiple versions of the case that emerge in these practices are actively bridged. Questionnaire and affidavits are read side by side. Legal recommendations are compared. How consistent they are when contrasted to each other is a central concern. At the end of the day, as Mrs K puts it, everything points to migration. Mrs E's case, one might think, illustrates a fault in the procedure. But far more is happening, I think.

[Mrs K] But you see? During the eligibility process he didn't mention any of this. Not to the police nor to the Conare officer nor to our lawyer here. So everything pointed to migration. He spoke very little English and no Portuguese at all. He came along with these other guys from Bangladesh and repeated the same story they told. He pretty much repeated the same discourse we are used to getting from migrants. Only later, when a social worker did the social interview, with a different logic, he ended up revealing these details. So we rushed back to Conare, saying that the case was not what it looked like. That it was much more complex; that we had new elements and so forth.

What Mrs K's story shows should not be dismissed as a fault in the procedure. Quite the opposite, in fact; judging by Mrs K.'s recollection, the procedure seems to have progressed smoothly, in the almost seamless progression from step to step that we are led to expect by the government's leaflet. The versions of Mr E's case enacted at the Federal Police and at Cáritas cohered. All practices encouraged the same conclusion on whether this young Bangladeshi was an economic migrant or a refugee. They 'pointed in the same direction'. Given this consistency across practices, denial was the decision plenary members had been steered towards. That this young man wasn't a refugee *was a fact*, I want to say, considering how the possible versions of the case had been arranged. There was consistency across practices, indeed. But this was not because all practices were looking at the same underlying case. Instead, consistency was achieved at the price of keeping the alternative enactment of the case that emerged from the social interview out of sight. Much more relevant than evidence of a fault in the system, this story points to the sort of ontological coordination that Mol tells us about.

Living with inconsistency

In Mrs K's story, Mr E arrives at IMDH and claims to fear political persecution. His case goes through a number of determination practices that are supposed to tell whether this claim is credible enough and fits the refugee definition. In Mol's stories, a patient enters a hospital and claims to have pain when walking. Her case goes through a series of diagnostic practices, which are supposed to tell whether her condition fits the medical definition of atherosclerosis. Mol insists that, by tying a range of heterogeneous ingredients in a particular way, each of these practices enacts a unique version of the condition from which this patient is said to be suffering. What puzzles Mol is how the versions of the patient's condition that emerge in these different practices can be drawn together as 'instances' of the same and single condition and described using a single name. While looking at the practices that make this possible, Mol ends up contrasting two general variants of coordination: a first, in which consistency between

different enactments of a patient's case is strived for, and a second, in which inconsistency between enactments is simply 'lived with'.

What is particular about forms of coordination that strive for consistency is that different enactments of the patient's condition are openly bridged. Different ways of enacting the condition are put side by side and compared. Doctors create common standards so they can choose among these enactments.¹⁸³ If these enactments do not map up to each other, these standards are used to decide what enactment will inform the diagnostic. When two ways of enacting the diagnosis are openly bridged and don't align, one of the diagnostic apparatuses wins the day.¹⁸⁴ Sticking to one enactment and ditching the other is one of the forms in which multiple enactments of a patient's condition can relate when there is disagreement and consistency is strived for.

But here is the thing, Mol tells us: consistency is not always strived for. We might end up with a consensual diagnostic saying that this patient is atherosclerotic. That doesn't mean that all diagnostic practices concurred. Nor does it mean that potential mismatches between the versions of the case emerging from different practices have been actively considered and dealt with. Singularity in the diagnostic is not synonymous to consistency. Alternative ways of enacting the condition might remain in tension, even though this tension does not always come to the fore.

Modes of coordination that strive and don't strive for consistency are different in this respect. If openly bridged, alternative ways of enacting the diagnosis can prove inconsistent. But these incompatible enactments are not necessarily bridged. They can be kept apart somehow. They can be displaced, so that their inconsistency might remain potential and doesn't lead to open disagreement. What we have, when this happens, is inconsistent singularity.

In Mr E's case, if actively bridged, the version of the case being enacted at the interview with the social worker and the version of the case being enacted at the Federal Police would clash. Had not Mr E gone back to IMDH, these two ways of enacting his case – as an economic migrant pretending to be a refugee or as a refugee fleeing religious persecution – would not be allowed to meet. Their potential for conflict would not have come to the fore.

Bacon and eggs

Mol gives an example of two ways of enacting atherosclerosis that relate in an inconsistent fashion without this inconsistency resulting in open controversy: the first is the enactment of the patient's condition we come across at the practice of vascular surgery. The second is the enactment of the patient's condition that emerges during the practice of internal medicine.¹⁸⁵ In these two settings, Mol says, atherosclerosis is enacted as a problem that has different temporalities. The doctor involved with vascular surgery approaches atherosclerosis as a present condition. The vascular surgeon is not so concerned with the process that led the patient to develop atherosclerosis. To the vascular surgery, an egg and bacon-breakfast is one that patients might be happy to eat after their veins have been unclogged. For the internist, on the other hand, identifying what caused atherosclerosis is a main concern: the fact that the patient eats eggs and bacon for breakfast is what needs to be avoided if the patient is not to develop these clogged veins again.

Mol notes that there is a lot of potential tension between these two practices. She says that, 'in theory', the clash between these two ways of enacting the condition 'is full blown'. For the internist, vascular surgery is a palliative. The fact that vascular surgeons pose as saving lives is close to hypocrisy. Vascular surgery rather enables death-threatening habits by dealing only with the clogged vein instead of attacking the cause of the condition. And yet, Mol tells us, although all the necessary 'ingredients' for a full blown clash are in place, controversy doesn't happen. The two ways of enacting atherosclerosis don't match up to each other; But this inconsistency is lived with. The inconsistency is there, but the controversy remains potential.

To illustrate how this sort of 'cold' inconsistent is possible, Mol comments on a conversation she had with an internist. This internist explains that, when a patient is diagnosed with clogged arteries, the doctors' main concern is whether the patient is at risk of suffering a heart attack or contracting gangrene. So, the patient who gets into the hospital is immediately referred to the vascular surgeon. What brought the patient to develop the condition is treated a secondary concern. This, Mol argues, is a key aspect of how two enactments that are incompatible can nevertheless co-exist.

*'Here, atherosclerosis is enacted as a present condition, there, as a process that has a history. Tensions between these ways to enact the reality of the disease are articulated. But it doesn't come to a full-blown fight. Instead, the differences between the condition atherosclerosis and the atherosclerotic process are distributed.'*¹⁸⁶

The enactment of atherosclerosis as encroached vessels (present condition/vascular surgeon) and its enactment as vessel encroachment (process-like/internal medicine) are potentially incompatible: favouring one comes at the expense of the other. But this potential incompatibility doesn't flare up in open mismatch. This, Mol tells us, is due to the very practical issue of distribution: these two ways of enacting the patient's condition are distributed in such a way that the practice that gives rise to the first enactment is part of the standard diagnostic path, while the practice that gives rise to the other is circumvented.

For me, that is one of the most important aspects of Mol's argument on coordination: her insistence that singularity can be achieved without open-bridging. Compare how different medical diagnostics relate and the way different determination practices are arranged. In the hospital, different diagnostic practices took place. There was not open disagreement between those practices that were openly bridged. The diagnosis of the condition encouraged by those practices that were compared all encouraged the same diagnosis. And doctors ended up with a consensual diagnosis at the end. Yet, Mol warns us that this singularity in diagnostic doesn't allow us to exclude the possibility that there were possible alternative ways of enacting the condition that didn't agree and that were simply kept out of the comparison. She reminds us of the alternative enactments that didn't have a chance to make themselves present – enactments that were kept out of our field of vision or enactments that were Othered, so to speak. This sort of inconsistent coordination, I want to say, is what Mrs K's story points to. If there is no open disagreement between practices as concerns Mr E's status, we may assume that the lack of disagreement exists 'because all practices were exploring the same underlying case and managed to assess it properly'. But no, Mol insists: singularity takes continuous work. Enacting singularity takes ontological coordination: it involves arranging determination practices in a manner that somehow displaces alternative case-enactments.

In Mr E's case, this coordination work takes the form of asking questions with an 'eligibility logic' and arranging hearings in such an order that the case enacted at the social-work interview gets lost on the way. Beyond Mr E's case, we see potential for this in the way the marshal asks question after question and translates 'demanded' for 'requested' while writing down Mr G's affidavit or the way the UNHCR officer highlights some aspects of the human rights report and downplays others. These are examples of contingent details in the determination practices that contribute to steer alternative enactment out of sight. Instead of by dint of an underlying singularity, it is thanks to little nothings like these that difference can be arranged during determination procedures, defining what enactment of a case gets to guide Conare.

Checkbox overviews as discursive devices

In this section, I rely on Mol's insights on difference and coordination to go beyond the 'as it is versus in theory' contrast and express what I find problematic about check-box overviews.

In 1994, Mol published an article with the Dutch ethnographer Marc Berg under the title 'Principles and Practices of Medicine'. These two notions are central to the textbook image of how the work of diagnosing and treating patients is organized.¹⁸⁷ What Berg and Mol find relevant in this principles and practices narrative is its rhetoric effect. Medicine is full of diversity, they say. Even a relatively banal condition like anaemia is prone to different definitions, each with their own diagnostic standards and practices.

Berg and Mol are puzzled by the fact that, when the diagnostics emerging from two of these apparatuses don't match, this discrepancy doesn't necessarily translate into a clash between defendants of different diagnostics. Two ways of diagnosing and treating anaemia might be incompatible, both in terms of the standards of normality they use and the diagnostic devices they demand. Even so, Mol and Berg say, it is very common in medicine that doctors will continue to use both treatments as complementary, without this causing the sort of open clash that might be expected if we take consistency as a necessary aim.¹⁸⁸

To make sense of this situation, Berg and Mol suggest that, on top of the practical arrangements that keep alternative arrangements distributed, this sort of cold inconsistency is facilitated by a principle and practice rhetoric. When two ways of diagnosing anaemia lead to discrepant diagnostics, doctors can make sense of the discrepancy in terms of an assessment being 'ideal' (belonging to the sphere of principles) but unpractical. 'Here, at the clinic, the laboratorial way of diagnosing anaemia would give more certainty but would be too costly or too fussy'. That is a powerful way of justifying the use of a diagnostic logic without having to take a stand on the overall pertinence of the other approach. A principle and practice rhetoric works thus like a sort of pacifying discourse. It makes it possible for discrepant diagnostics to co-exist in tension without this discrepancy coming to anyone's attention.

The checklist way of describing the relation between determination practices holds, I believe, a similar effect. When there is inconsistency, we might take it for granted that we need to strive for consistency. In turn, when we take consistency as a necessary goal, we might end up expecting controversy between those case enactments emerging from different practices. My point is that, like the practice and principles rhetoric, the way of talking about different determination practices as if they were steps in a checklist also works as a pacifying discourse.

This pacifying potential is not necessarily a good thing, however. Checklist talk leads us to expect consistency in the way that same and singular cases come to the fore in different determination practices. When that consistency is achieved, we don't take into consideration the possibility that alternative ways of enacting the case might have fallen out of sight. By pacifying potential tensions between alternative enactments, checklist talk facilitates the Othering of alternative enactments.

In Mrs K's story, the interviews with the Federal Police and the eligibility lawyer at IMDH were consistent. They encouraged the conclusion that this young Bangladeshi's claim for refugee reality was weak. At a different interview, however, done with 'a different logic', the social assistant gives more emphasis to the process-like sources of the claim. The questions asked and the way the interview was conducted were not the same. The version of the case emerging from these practices didn't match. Plenary members would therefore be steered towards opposing assessments depending on which experimental apparatus was used to make each assessment. Judging the version of the case enacted during practice 1 and 2, plenary members were steered to conclude that this Bangladeshi was not a refugee. If they were to judge the version of the case as enacted at practice 3, then this young Bangladeshi's claim for refugee reality would likely come across stronger. And yet, the inconsistency between these alternative ways of enacting the case would probably remain cold, were it not for the unexpected interview that, conducted with a different logic, allowed other elements to come up.

To paraphrase Mol, all the ingredients for a full blown controversy were in place in Mr E's case. And yet, were it not for the unexpected interview, the alternative enactment of this case would have been lost. The controversy wouldn't have become overt. This mismatch between alternative ways of enacting Mr E's case would have remained cold. It is in such a context that the critiques of checkbox overviews I heard in São Paulo and this Bangladeshi's story resonate. This Othering, I want to suggest, is facilitated by checkbox overviews. By encouraging us to think of social care as belonging to a different dimension of refugee protection and to think of status determination in terms of steps in the assessment of the underlying same and singular case, checkbox overviews make this sort of practical displacement harder to grasp. As asymmetric talk kills the drive to ask how a case was enacted as having legal and empirical support, checklist talk kills the drive to consider whether alternative ways of enacting the case have been Othered along the way.

Mol's terminology thus helps make sense of what I find problematic about checkbox overviews. The notion of enactment encourages us to treat each practice as enacting a unique reality for the case. These check box descriptions, however, still work under an assumption of singularity. They take as a given that different practices are ways of collecting information and producing a decision about the same and single case. Check box overviews thus reinforce an assumption of singularity that gives consistency across practice such a relevant role. It naturalizes the assumption that, if all practices are dealing with the same case, they should arrive at the same conclusion.

I take issue with the assumption that common assent occurs 'because they all looked at the same case free from bias and thus, as expected, got to the same assessment'. We gain something when we leave this sort of checklist talk aside: we get to notice the ontological coordination happening in the space between singularity and open controversy. We get to see how details as small as the order in which hearings are arranged, questions are asked and evidence is organized might affect the outcome of asylum requests. We become more aware of how these little nothings end up making the difference between the asylum seeker emerging as a bogus applicant or as a refugee.

Steering decisions

The procedural handbook cited at the start of the chapter reads that if applicants ‘actually experienced the events they recount, and are genuine in their statements, then they will broadly be able to recall these events and related facts accurately and consistently’.

In this chapter I extended the same logic to the justifications examiners give for denial and considered whether this logic holds. Suppose examiners all agree that Mr E’s case is weak. Their assessment of the request is completely consistent, in the sense that all examiners involved in all steps of the determination work got to the same conclusion that Mr E is most likely an economic migrant instead of a refugee. Does this absolute consistency give reasonable basis for the denial of Mr E’s request?

The argument I put forward is that the fact that a case is consistently assessed as weak across different determination practices (or is shown to be inconsistent, to phrase it the other way) gives no reasonable basis for the denial of the request. This applies not only when there are small inconsistencies that might be shown to be false in the long run, but also when all determination practices agree that the case is weak.

As argued in Chapter 3, to speak of enactment is to keep in mind that each determination practice ties together a range of heterogeneous phenomena in a very specific way. It is to acknowledge that the answer to whether the request is strong and the adoption of a particular apparatus to make this appraisal are simultaneous social processes. Extended to how we conceive of the relation between determination practices, this enactment approach problematizes the assumption of singularity embedded in checklist overviews.

By reinforcing the assumption that different practices are assessing the same underlying case, this sort of step-talk contributes to hide the practical arrangements that keep alternative ways of enacting asylum claims out of sight. This checklist way of thinking about status determination encourages us to expect consistency in the way the case should come to the fore. When that consistency is achieved, we don’t take into consideration the possibility that alternative ways of enacting the case might have been Othered.

During status determination, an asylum case moves through a rich range of practices: the request at Cáritas, the formalization of the case at the Federal Police, an interview with a lawyer, a hearing with a Conare officer, a chat with a social worker, debates at GEP or a deliberation at a plenary meeting.

In an enactment imaginary, these practices are not boxes to be checked or steps in the path towards a decision. They are not complementary tasks in the work of collecting information about a same and single case. As we get to appreciate if we look at status determination through enactment lenses, the way practices are arranged does more than to disclose the strength of the case. It allows for the emergence *as a fact* of the conclusion that the asylum seeker isn't a refugee.

DECISIONS BY CONARE

POSITIVE DECISION:

Caritas informs CONARE's decision about the recognition of refuge;

The refugee requests an Identification Card at the Department of Federal Police;

The refugee signs the Term of Responsibility at the Department of Federal Police.

NEGATIVE DECISION:

Notification of the decision by the Department of Federal Police.

An appeal can be filed with the Ministry of Justice within 15 days;

Caritas can provide guidance about the appeal to be filed.

Note: the person requesting refuge has obligations in relation to the country he/she is in. They should obey the laws and regulations and the means to maintain public order.

Negative decision from the Ministry of Justice

If the Ministry of Justice denies the appeal, the person who requested it will be subject to the foreign legislation in effect in the country.

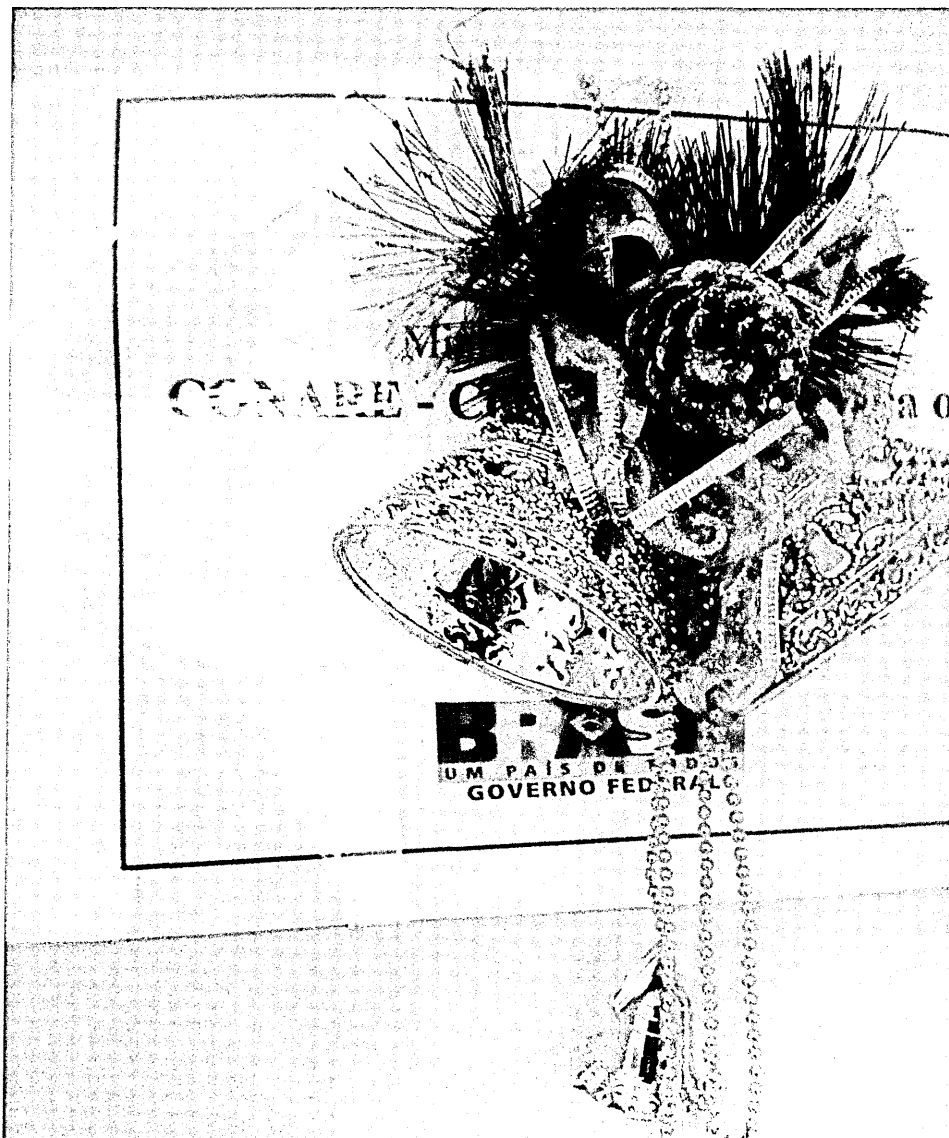
Making Decisions

It is 10:00 in the morning in Brasília. Envoys of different ministries, the Federal Police, Cáritas and UNHCR are gathered in room 304 of the Justice Ministry building, waiting for the plenary meeting to start. The list of participants makes for a curious crowd. Case examiners sit among lawyers and priests. Police officers rub shoulders with nuns and diplomats. A few formalities are dealt with before the quorum is verified: new members are welcome, announcements are made, dates for future meetings are confirmed. And then it is time to vote. 'Case number 08451/2012-13, Mrs Z, citizen of the Democratic Republic of Congo: the asylum request is denied. The request doesn't fit the eligibility criteria'. 'Case number 08505/2012-13, Mr F, citizen of Pakistan: status is granted. The eligibility criteria fixed by article 1 of Law 9474 has been fulfilled'. The meeting goes on like this. Some cases are accepted and some cases are denied. Some processes are singled out for discussion while others go straight to vote. After the meeting records are reviewed, the session is declared closed. Taken back to Conare's office at the fourth floor, the results are typed into letter-headed paper. With the help of a fax machine, a final list is passed on to police stations and Cáritas's offices across Brazil.

When the fax machine blips back in Rio, many months have gone by since Mrs Z filed down her request. Between claim and decision, an endless number of determination practices have been put in play. A lot of hardware and a lot of hard work have been mobilized so that plenary members could enter this meeting room in Brasília a year or so later, carrying Mrs Z's file in their hands. For months, examiners have collected evidence, conducted interviews and carried out inquiries. All these steps have finally brought them here, to the day when plenary members reopen Mrs Z's file and decide.

With the pre-analysis executed, the cases go to the Conare's plenary to be decided. In the plenary each member is entitled to one vote, and decisions are made by majority. If the decision is positive, the asylum seeker is recognized as a refugee in Brazil. If the decision is negative, [...] the person is subject to the general foreigner's regimen and is not a refugee in Brazil.¹⁸⁹

After months of deliberation, legal opinions are forwarded to the plenary meeting, where high-ranking envoys sit together and decide. Judging by the declaratory picture of asylum decisions, this eccentric meeting in Brasília is the pinnacle of the determination work. If there is a pivotal moment when the decision on whether Mrs Z is a migrant or a refugee is made, then this meeting must be it. Or is it not?



[Picture 17 – Arriving at CONARE]

This chapter takes issue with the image of asylum decisions as something that happens at the end. So far, I have encouraged scepticism towards the declaratory picture of status determination. In the previous chapters, I have disputed the image of asylum decisions as declaratory and explained why I don't believe decisions can be arrived at by judging consistency, assessing empirical support and measuring legal fit. This chapter dwells on the fifth and final aspect of the default picture: the assumption that the answer to whether the person is a migrant or a refugee is defined by a set of deciding subjects at a pivotal event.

In the literature on migration and border controls, there has recently been a lot of talk about *decentring* decision. The image of high-ranking politicians declaring who belongs to the community has been criticized as 'too unitary' and 'too top-down'.¹⁹⁰ Besides being misleading as a sociological portrait, the image of welcomed and unwelcomed individuals being set apart in a pivotal moment has been charged as politically disempowering.¹⁹¹ It is criticized for being tied to a picture of politics that happens in exceptional moments, instead of as something in which we are invested in our everyday lives.¹⁹² In contrast to this event-centred picture of decision, we are told that the border between welcome and unwelcome is brought about in 'multiple and dispersed' ways.¹⁹³

As I anticipated in the introduction, I was influenced by this decentred take on decision while following the work of status determination in Brazil. With my stories, I have sought to show that the practices that steer a case like Mrs Z's towards denial are happening throughout the procedure. What comes to count as the anterior strength of the case is affected by matters as contingent as an examiner's decision to ask questions in a certain tone, by the order in which interviews are arranged, the quality of a photo or by a fingerprint scanner's insistency not to cooperate. My hope is that the stories told in the previous chapters will have contributed to tip the interest away from this pivotal moment of decision and towards the dispersed, more decentred bordering work that occurs between claim and ruling.

Now, as we start to change focus, it is tempting to overstate the argument and say something like "there is no decision at all". But here a more down-to-earth reader could quip, 'Then what about this meeting you just described, with

all the nuns and diplomats?’ What about this event that takes place in Brasília, when plenary members sit together in room 304 and, in a very concrete sense, make a decision on Mrs Z’s request? If the enactment of Mrs Z as unwelcome happens in a decentred way, how come we continue to see this meeting in Brasília as being so pivotal, nevertheless?

This chapter argues that maintaining the perception that there is a pivotal moment of decision is a central aspect of how status determination can arrive at an official closure, in spite of the fact that the case’s weakness is never conclusively demonstrated. I hope to show in this chapter that talk of a pivotal moment of decision defers the task of showing that the case is weak to an elusive moment of definition, which never actually takes place. Drawing on the science studies toolset, I borrow the notion of phase work to refer to this way of talking.

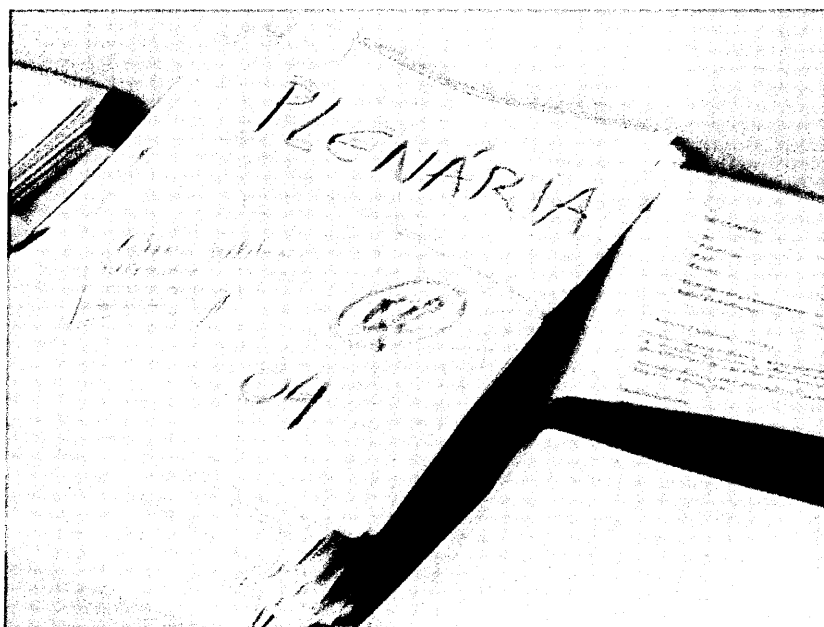
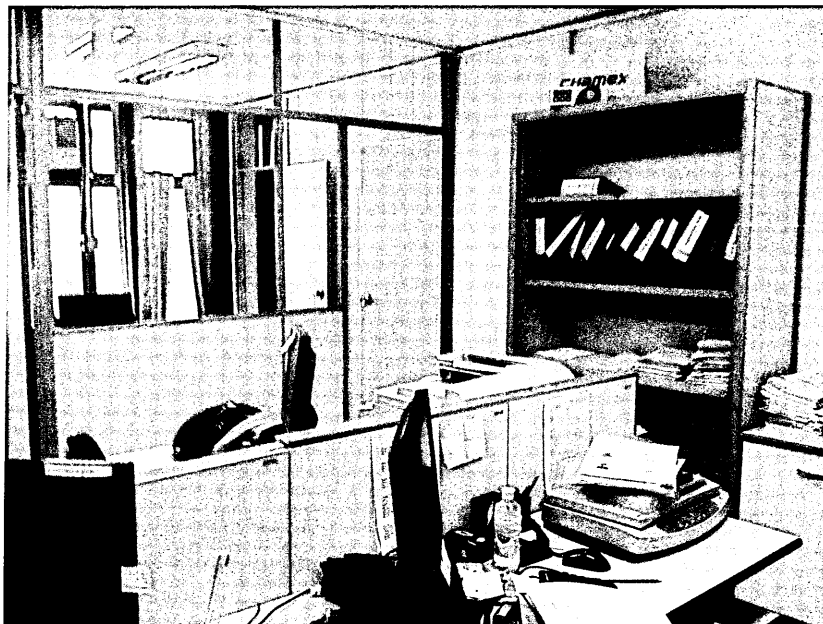
I start the argument by introducing the notion of phase work and sketching how it becomes visible in examiner’s talk. I then move on to unravel the official justifications given for the denial, to give a closer example of phase work at play in Mrs Z’s request. Finally, I conclude by spelling out how this decentred mind set challenges the declaratory picture of asylum decisions.

Phase work

Let us start by considering how examiners talk about the moment of decision, to get a first sense of how phase work unfolds. We are back at the annex building of the Justice Ministry in Brasília, crossing the dim hallway that leads to the fourth floor, where Conare’s eligibility team operates. At the door of room 422, I cross paths with Conare’s coordinator, whom I had met during a hearing in Rio. We shake hands and I ask if he would be OK answering a few questions. At this moment in our conversation, we are talking about where decisions take place.

[Mr V:] At the moment of the request, the police is not actually doing a judgment of merit. The guy is not actually assessing the case. The officer is just writing what he can write at that moment. So, there is no judgment at that point. The actual debate about eligibility starts later, in the proper instances that exist for this sort of debate, at the GEP meeting and at the plenary meeting. Here, in Conare, is the place we have to have these discussions. I can’t just go to the police and say, like, ‘Oh, this is not right, this is wrong ... the police is not working well here at the beginning’. Nooo no no ... it doesn’t work like that.

[Picture 18 – Inside Conare’s HQ]



[Picture 19 – Plenary cases]

In this remark, Conare's coordinator is telling me about the participation of the Federal Police in the determination procedure and on its significance to the determination work. He insists that, during the hearing at the police station, the main concern is not to assess the case's strength, but simply to formalize the request. The police officer is there to write down a first version of the claimant's narrative. This is part of the determination procedure, he claims, but it shouldn't be mistaken as an assessment practice in itself. To decide on the case is to assess whether it has legal and empirical support, whether the narrative is consistent, whether the case is strong. At the Federal Police, the officer preparing an affidavit has no say in this work. The police officer is not doing any such assessment of merit. This assessment, he insists, belongs to the 'formal spaces' reserved to this task by the Brazilian law: the group for preparatory studies and the plenary meeting.

When we have a chance to talk more informally, we sometimes talk with the officer and with the interviewers who are there, down the line. When this is possible, we do try and discuss the case at the source. But the decision itself is restricted to formal forums.

Mr V underscores that the final assessment on whether the asylum seeker is a migrant or a refugee is to be done properly, at the formal forums specified by the law. When possible, it is OK to engage the officer interviewing the asylum seeker 'down the line'. But if due process is to be observed, then there are certain formalities that need to be followed. Mr V remarks again: for each task, there is a proper moment and place.

There is not such a thing as getting to Conare's office and asking to talk with the officer who went to the mission because I disagree with the way he did the interview ... that wouldn't happen ... there is not such a thing! [não existe isso]. These things have to be done formally, at the proper moments, at GEP and the plenary, when we decide on the case together.

Mr V talks of the moment of decision with much confidence. Even in a quick remark like this, however, this moment of decision is localized in more than one way. When talking about where and when this 'proper moment of decision' would be, Mr V oscillates. At first, GEP is presented as distinctly decisive in the

process of assessing requests. The resolution by the plenary is pictured almost as a formality, which simply confirms the decision already taken in GEP. By the end of the passage, however, the proper moment for assessing the case is specified to exist in a different moment and place. This time, the pivotal decision is located in a more predictable way, with all decisiveness being attributed to the moment in which the request is brought to a vote at the plenary meeting.

We first discuss the case at GEP, to make sure everybody is on the same page. Most of the time, this is enough to close the issue. When that happens, that's good, even better. The case will come to the plenary and the plenary will vote. But if the disagreement remains and the arguments are strong for both sides, or if the case brings elements that depend on a position by Conare, then we bring it to the plenary to be discussed. Now, even if GEP is in consensus that [a case] is positive, that doesn't mean that GEP's recommendation is the decision. If the plenary judges that it wants to open the case for discussion even though GEP has consensus, the plenary can do it. Because GEP is a space for study. It is not a space for decision. It doesn't emit a ruling. GEP emits legal opinions, but no decisions. The plenary, yes, makes the real decision. It is here that it is decided.

Mr V wavers when defining the specific time at which the pivotal moment of decision is supposed to take place. He claims that, 'most of the time', the discussion at the GEP will be enough to close the matter on whether the asylum seeker is a migrant or a refugee. At the same time, however, Mr V insists that it is at the plenary meeting that 'the real decision' takes place. This is the feature of Mr V's discourse that I want to attend to: this way of referring back to a moment of decision even though it is not clear when and where it takes place. It is tempting to dismiss this ambivalence as incoherent speech or as an example of Mr V being convoluted. But something more significant is going on around this slippage, I think.

In Chapter 4, I discussed how Mol and Berg reacted to the co-existence of conflicting diagnostics. To make sense of this situation, Berg and Mol suggest that, on top of the practical arrangements that keep alternative arrangements distributed, cold inconsistency is facilitated by a principle and practice rhetoric. When two ways of diagnosing anaemia lead to discrepant diagnostics, doctors

can make sense of the discrepancy in terms of an assessment being 'ideal' (belonging to the sphere of principles) but unpractical. That, Mol and Berg argue, allows doctors to justify the use of a diagnostic logic without having to take a stand on the overall pertinence of the other approach.

Giving a temporal spin to the idea that discourse can have a pacifying effect, American ethnomethodologist Michael Lynch coined the expression 'phase work' to describe a similar proclivity in expert talk. Lynch shows how, thanks to a way of speaking that oscillates when specifying a moment of decision, experts can go on saying that a controversy has been settled, even though the technical controversy has never been overcome. Beyond a symptom of convoluted speech, that is the more significant effect I believe can be attributed to Mr V's talk. By suggesting that there is a moment of decision while at the same time oscillating when specifying it, this way of talking allows status determination to move towards an official ruling, in spite of the fact that the case's weakness is never conclusively demonstrated.

Lynch's experts of choice are lawyers, scientists and forensic experts involved in a controversy about the use of DNA fingerprinting as evidence in the US.¹⁹⁴ Lynch and his colleagues developed the notion of phase work when trying to make sense of the fact that the controversy was brought to a practical closure, in spite of the continuous potential for technical dissent.

They argue that controversy on matters related to laboratory error and the calculus of statistical match are still viable in principle. Still, cases relying on DNA fingerprints often proceed as if these controversial matters had been addressed. To account for this, Lynch and his colleagues suggest that the possibility of circumventing this potential for dissent is facilitated by deferring these controversial matters to an elusive moment. The solution of controversial matters is deferred to a moment of discussion that never really takes place. As sarcastically explained by one of Lynch's interviewees: 'at the admissibility stage, you can't raise any of these issues because they are weight issues [meaning that they must be dealt with by the jury], but when you get to the jury you can't raise any of those issues because they are admissibility issues, so you're never able to raise them'.¹⁹⁵

Demarcation

The notion of phase work has a long conceptual pedigree. It can be read as a spin-off of the discussion on boundary work, which is a distant relative of the debate on how to demarcate science and pseudoscience. Demarcation has been a central problem in the philosophy of science for many years, and has attracted the attention of many renowned thinkers. Karl Popper, for instance, defended that only theories that can be proved false should count as acceptable knowledge (to the anger of Freudians and Marxists alike).¹⁹⁶ Historian of science Thomas Kuhn argued, in turn, that it is the ability of a scientific thesis to solve relevant puzzles that defines whether it is accepted or not.¹⁹⁷ In a similar tone, the black sheep of epistemology, Paul Feyerabend, criticized normative prescriptions for the genesis of knowledge as both artificial and counter-productive, which led him to the much abused formula that 'everything goes'.¹⁹⁸

As the sociology of knowledge took flight, arguments put forward by Bloor and Collins, among others, raised questions about the pertinence of taking this asymmetry between right and wrong theories as a methodological starting point. The notion of boundary work was developed by American sociologist Thomas Gieryn under this symmetric spirit.¹⁹⁹ In his widely quoted 'Boundary-work and the demarcation of science from non-science', Gieryn proposes to repose the demarcation problem in terms of practical action. Instead of discussing the features that differentiate science from non-science, he suggests that we look at how those living the everyday work of doing science have managed to reinforce this distinction in practical settings. Demarcation, as Gieryn put it, 'is not just an analytical problem'.²⁰⁰ It is something that experts do – when editors select some drafts and refuse others, or when scientists manage to characterize opponent sources of knowledge as lacking scientific qualities. This practical work of establishing the difference between good and bad knowledge is what Gieryn means by boundary work.²⁰¹

Gieryn's call for the study of boundary making in everyday settings has been extended to law by Sheila Jasanoff. Jasanoff questioned how the demonstrations by science studies of the contingent nature of scientific knowledge can be reconciled with the authority that scientific experts are granted when invited to participate in legal procedures.²⁰² Her suggestion is that boundary work allows for 'the provisional nature' of scientists' claims to be 'screened from public view'.²⁰³

With the notion of phase-work, Lynch and his colleagues can be seen as restating Gieryn and Jasanoff's use of boundary-work in temporal terms. Along with administrative and technical fixes that make it hard to sustain doubt about the reliability of DNA fingerprinting, talking of proper moments, they say, works as a temporal demarcation device. It allows the discussion to come to a closure in spite of the potential for continuous questioning of mundane technical issues. The correct way of calculating statistical match is not resolved from a technical point of view. But cases can progress, as it were, as the sources of dissent are consigned to a proper moment of definition that never comes to pass.

Something similar takes place during Mrs Z's case. Procedural issues that are potentially controversial like 'which report is reliable' or 'what counts as inconsistency' are never conclusively settled. Yet, the work of status determination somehow goes on. This, I argue, is made possible in part by phase work. When justifying their decisions, examiners talk *as if* these potentially controversial matters had been settled. As the procedure goes on, the assessment that Mrs Z's case is weak becomes a fact. The where and when an answer to these potential controversies is supposed to have been given remains elusive, however. As in Mr V's description of the GEP meeting as being decisive and indecisive at the same time, the decisive event is first postponed and then referred back into the past, so there is never a 'now'.

A practical consequence of this consists in a toughening of the standard proof, which, in time, translates in an inversion of the burden of proof. The procedural note on these topics reads that 'there is no necessity for the adjudicator to be fully convinced of the truth of each and every factual assertion made by the applicant'.²⁰⁴ Thanks to phase-work, Mrs Z's statements are held to a standard that is much stricter than Conare's justification for denial upholds. Conare's initial conclusion that the case lacks legal fit, consistency and empirical support is accepted, even though technical controversies remain open. When the initial denial is brought to an appeal, the burden for showing that dissent is still possible falls in full on Mrs Z.

Deferring Dissent

So far, I have sketched the general outline of this phase work using Mr V's talk as an example. This section will unpack this work of phase making in closer detail. Mrs Z's case is especially suitable to this.²⁰⁵ As it develops into an appeal, all justifications given for denial are gathered in the same folder. The excerpts below were produced during the very last stages in the decision making. These comprise the legal recommendation and internal communications prepared by GEP, the resolution produced by the plenary members and the justifications for denial given by CONARE's chair and the justice minister. By following these

justifications, step by step, I want to foreground how potential sources of dissent are gradually left behind, even though they are not addressed.

Justice Ministry
National Justice Secretary
CONARE – National Committee for Refugees
Reference: DELEMIG/RJ 05624.014568/2010-19

Mrs Z, citizen of the Democratic Republic of Congo, born on 03/04/1985, daughter of Mr K and Mrs Q, single, arrived in Brazil at 17/01/2009, landing in the city of Rio de Janeiro, arriving from her native country, requests the recognition of her refugee status alleging fear of death in case of return.

After the appreciation of all the information produced by the asylum seeker's statements in her asylum request questionnaire, police affidavit and interviews with CONARE, **it has been verified that there is no reason to speak of well-founded fear of persecution, in agreement with the eligibility criterion fixed by Law 9474/97, as seen from the following.**

Preliminarily, the asylum seeker states that she came to Brazil in 2009 to study mathematics, having previously studied Portuguese for foreigners at the state university. However, in her passport it reads that the temporary visa was granted for the 'Portuguese for Foreigners' course, there being no mention of mathematics, which makes **unclear the reason for her stay in Brazil.**

To the Federal Police, (the claimant) mentions that, in May 2009, her father, a human rights activist, was kidnapped by the Kabila government. However, before CONARE, she tells that after a month in Brazil, that is, March 2009, her father was arrested and not kidnapped, as claimed earlier.

Another contradictory point resides in the fact that the claimant said her father had been arrested and after that, almost a year later, when released from prison, his body was found. This allegation is false, given that the information found indicates that the claimant's father was found dead on 02 June, but had been with his family a day before.

Furthermore, it is crystal clear that the asylum request happened for migratory reasons. The claimant stayed a year in Colombia, when, theoretically, her father had already been arrested, and could have requested asylum there, but didn't. Only when she returned to Brazil the claimant requested asylum. **It rests evident that the asylum request has been made to solve a merely migratory issue.**

For all that, CONARE's Group for Preparatory Studies does not recommend the recognition of refugee status to the claimant, given the allegations that she is the daughter of a human rights activist haven't been proved, that the claimant lacks credibility, and also because it hasn't been demonstrated the existence of well-founded fear of persecution, for which reason there is no fit with the eligibility criteria foreseen in incise I, article 1, Law 9474, from 22 July 1997.

Mrs R, full member, CONARE / Mr N, full member, CONARE

The brief above is an excerpt of the recommendation for denial prepared by GEP members. According to it, it rests 'crystal clear' that Mrs Z's drive is migratory. Lack of legal fit, weak empirical support and internal inconsistency are all mentioned as indicators that her claim for refugee status is unwarranted. The justification states assertively that the request lacks legal support, as there is no reason to speak of well-founded fear of persecution. Mrs Z's case is also empirically weak, the justification claims, as her condition as a daughter of a human rights activist could not be verified. GEP members also point to inconsistency as an indicator that Mrs Z's story lacks credibility. The justification mentions a disparity in the statements made to CONARE and the Federal Police. Mrs Z misplaces the date of her father's death by one day. The reasons that drove her to Brazil are deemed dubious as well: she could have stayed in Colombia, examiners suggest. And it is not clear which topic she was studying in the first place: Portuguese or mathematics. There seems to be little doubt that Mrs Z would be better characterized as a migrant than as a refugee.

It is important to notice from the start that all these justifications would be susceptible to the sceptical challenges I put forward in the previous chapters. Take the issue of legal fit, for instance. The conclusion states that Mrs Z's request lacks legal fit as 'it hasn't been demonstrated the existence of well-founded fear of persecution'. A dissenter could challenge GEP members to show that this is indeed the case, asking them to specify the exact meaning of 'well-founded fear' and other terms like 'race' or 'belonging to social group'. Scepticism could also be raised about the claims related to empirical support. The justification states that Mrs Z could have asked for asylum in Colombia. To this, a committed enough dissenter could object whether Colombia should be considered a safe country. GEP members could then bring reports to substantiate their point of view. But, at this point, our dissenter could question the reliability of this evidence and lock the controversy in a regress. Finally, reacting to the conclusion that Mrs Z's narrative is inconsistent, a committed enough dissenter could challenge GEP members to explain what is the criterion used to judge what inconsistencies were relevant and what were not, what inconsistencies can be attributed to trauma and what cannot, and so on.

Methodological horrors

Harry Collins proposes an amusing thought experiment to illustrate the complexity involved in comparing experiments. Imagine, he asks, that you are a 'philosopher-mouse' and a complete stranger to scientific work. Now imagine you have been asked to write down a manual on how scientists compare the result of their investigations. Scientist A puts together a test and arrives at a result. Scientist B puts together a test and arrives at a result. You, the philosopher-mouse, are interested in explaining, in as much detail as you can, each step that these scientists need to take to decide whether their results are aligned.²⁰⁶

For instance, suppose scientists want to know whether it is possible for someone to move an object with the power of the mind (this is the subject of psychokinesis, picked by Collins). To start with, being a complete stranger to the scientific work, you could be brought to ask how it is decided what experiments are experiments on psychokinesis in the first place. For instance, should the use of my mind to move my arm count as a test on the power of mind to control matter? The proposition might sound ridiculous, but, you, the philosopher-mouse, will have to spend some time trying to explain what criterion of demarcation you are using. Assuming you find a way to move beyond this first sieve of complexity (Collins's speaks wittily of 'murine solutions'), you will then see yourself having to decide what of the activities you accepted are scientific enough to deserve being used in the cross-test. Here again, Collins's philosopher-mouse ends up embroiled in complexities concerning the demarcation of what counts as science and what counts as pseudo-science.

Collins follows this *reductio ad absurdum* until after the experiments have been done and their results compared.²⁰⁷ He asks us to assume the unlikely scenario that 'the philosopher-mice can squeak their way through all this and, invoking murine-rules as the need arises, arrive at a set of scientific experiments on topic "r" and that these experiments 'have all been done competently by suitable investigators and unambiguously assigned with negative or positive results'.²⁰⁸ Collins asks: even if our philosopher-mouse could muster the superhuman ability to settle all these stages of potential controversy, 'does it then follow naturally that "r" has been replicated?'²⁰⁹

Collins's answer, once again, is meant to stress the potential for controversy. For instance, let's assume that all these 'r' tests have arrived at results that are completely inconsistent to each other. How can we be sure that enough tests have been conducted to warrant that conclusion? 'How long must the series be?'²¹⁰ Conversely, assume that all experimental practices have yielded perfectly consistent results. Having in mind all the variables that need to be taken into consideration, wouldn't a 100% match be too good to be true? This, as Collins puts it, opens the issue of 'proper ration of success'.²¹¹ Finally, if the results are mixed and don't point conclusively to either a positive or a negative match, how to overcome the potential for under-determination and regress that comes with this?

Collins' argument is a very detailed *reductio ad absurdum*. His thought experiment works to show us that 'at each level of the siege', whether they are aware of this or not, experts work under the spell of these formal and methodological sources of controversy.

The reason why I link these justifications to potential sources of dissent is not to question the possibility of moving on with the procedure. In Mrs Z's case, the procedure was not brought to a halt. The point is simply that the fact that the procedure continued doesn't authorize us to conclude that the lack of legal fit, empirical support and consistency has been demonstrated at this stage. To bend a phrase, I establish this parallel between reasoning and potential sources of dissent as an illustration of the 'methodological horrors' that continue to haunt examiners, whether they are aware of them or not (see box above).²¹² Granted a committed enough dissenter who is willing to take scepticism to the very bedrock of decision, it is possible to envisage all the arguments given by the GEP as justifications for denial being picked apart and deconstructed.

With that in mind, we can now get back to the justifications for denial produced around Mrs Z's case. The two documents that follow are the Portuguese original and my English translation of the internal certificate confirming the decision for denial that was forwarded to Caritas's office and police stations across Brazil.

Ministry of Justice
CONARE – National Committee for Refugees

CERTIFICATE

I hereby certify for all due purposes that the National Committee for Refugees – CONARE, in its Plenary Meeting realized at 26 November 2010, **accepting the recommendation of its Group for Preparatory Studies**, decided for the non-recognition of refugee status for the asylum seeker, **for lack of fit** with the eligibility criteria fixed by art. 1º from Law 9.474, from 22 July 1997.

The decision has been communicated to UNHCR, Caritas Rio de Janeiro, Caritas Sao Paulo, PF-RJ, PF-SP, PF-RS, PF-AP, PF-Divinopolis/MG, PF-PE and IMDH, through documents OFs/CONARE 495, 496, 499, 500, 501, 502, 504, 506 and 507, respectively, dated from 30 November 2010.

General Coordinator / CONARE



Ministério da Justiça
CONARE - Comitê Nacional para os Refugiados

CERTIDÃO

Certifico para os devidos fins que o Comitê Nacional para os Refugiados – CONARE, na reunião plenária realizada em **26 de novembro de 2010**, acolhendo proposição de seu Grupo de Estudos Prévios, decidiu pelo não reconhecimento da condição de refugiado (a) do (a) solicitante [REDACTED] por não se enquadrar o caso nas condições de elegibilidade previstas no art. 1º, da Lei nº 9.474, de 22.07.1997.

A referida decisão foi comunicada ao ACNUR, DICRE/ CGPI-DF, Cáritas Rio de Janeiro, Cáritas São Paulo, PF-RJ, PF-SP, PF-RS, PF-AP, PF-Divinópolis/MG, PF-PE e IMDH, através dos OFs/CONARE **495, 496, 497, 498, 499, 500, 501, 502, 504, 506 e 507**, respectivamente, datados de 30 de novembro de 2010.

[REDACTED]
Coordenador-Geral/CONARE

At this point in the decision making process, we can see that the perception that Mrs Z's request lacks legal fit is stated in more assertive terms in comparison with GEP's initial report.

According to Conare's general coordinator, Mrs Z's request has been denied because it was determined that it didn't fulfil the eligibility criteria fixed by the Brazilian law. The document makes reference to the GEP as the site where this lack of legal fit is supposed to have been demonstrated. According to the document, the plenary was simply following the assessment arrived at by the GEP when it concluded that Mrs Z's case lacked legal fit. This might make it seem as if the potential for dissent concerning the measurement of legal fit has been dealt with in GEP, while, as I have suggested above, this was hardly the case. The methodological horrors I listed above, concerning the examiner's ability to assess legal fit, empirical support and consistency, continue to be viable even when the decision process has arrived at this point. In principle, these sources of dissent would still be open for a committed enough dissenter. Just like this document is raising doubt about the justifications for acceptance given by Mrs Z in support of her claim, the justifications given by Conare in support for the negative ruling could be picked apart and deconstructed.

In this move from one phase of the justification process to the other – from the recommendation prepared by GEP to the decision taken by Conare's plenary – the perception that Mrs Z's request is weak seems to have become more certain. This allows the work of status determination to go on and allows the decision by the plenary to come across as justified.

In spite of the continuous potential for dissent, the need to tackle these controversial matters is deferred to a moment of discussion that never really takes place. The moment in which it has been shown that Mrs Z's request lacks legal fit is gently referred back into the past ('The plenary meeting 'accepting the recommendation of its Group for Preparatory Studies' decided to [...]'). Eventual sources of dissent that could be directed towards Conare's ruling are pacified through this phase-work. The responsibility for showing legal fit, empirical support and consistency starts to turn towards Mrs Z.

Ministry of Justice
CONARE – National Committee for Refugees

Reference: DELEMIG/RJ 05624.014568/2010-19

Subject: Appeal to the Illustrious Sr. State Minister of Justice regarding the decision announced by CONARE, who denied asylum request, according to article 29 from Law 9.474/97.

Claimant: Mrs Z

Mr CONARE President,

- On 17/06/2010, Mrs Z, citizen of the Democratic Republic of Congo, asked CONARE the recognition of her status as refugee in the terms of LAW 9474/97, from 22 July 1997.
- After the end of the determination procedure, the request has been appreciated by CONARE who, **adopting an early ruling emitted by its Group for Preparatory Studies**, denied the request on its plenary meeting realized on 26/11/2010, for considering that **the facts reported for asylum seeker didn't configure the well-founded fear of persecution** for political, religious or ethnic reasons, which excludes the claimant from the eligibility criteria fixed by article 1, Law 9474, from 22 July 1997.
- Duly notified, the asylum seeker appeals from this decision before His Excellency the State Minister of Justice, in the terms of article 29, law 9474/97, without adding any new fact that would make the case suited for reconsideration after appeal.
- In the terms of article 18, paragraph 1 of CONARE's internal regiment, **the appeal does not possess any support in fact of law** that would justify including the claimant in any of the eligibility criteria foreseen in the abovementioned law, for which reason it should not prosper.
- Therefore, for all said, we propose the maintenance of the decision taken by the Committee that denied the request for recognition of the refugee status of the claimant, **for lack of legal support**.

Brazil, November 2011

General-Coordinator / CONARE



Ministério da Justiça
CONARE - Comitê Nacional para os Refugiados

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Referência: Processo DELEMIG/RJ [REDACTED]

Assunto: Recurso ao Excelentíssimo Senhor Ministro de Estado da Justiça da decisão proferida pelo CONARE que indeferiu a solicitação de refúgio, nos termos do art. 29 da Lei nº 9.474/97.

Recorrente: [REDACTED]

Senhor Presidente do CONARE,

- Em 17.06.2010 [REDACTED] nacional da República Democrática do Congo, solicitou ao CONARE o reconhecimento do "status" de refugiado nos termos da Lei nº 9.474/97.

- Após o término dos procedimentos, a solicitação foi apreciada pelo CONARE que, acatando parecer prévio emitido pelo seu Grupo de Estudos, indeferiu o pedido na reunião plenária realizada em 26.11.2010, por considerar que os fatos relatados pelo solicitante não configuravam o fundado temor de perseguição por razões de ordem política, religiosa ou étnica, o que o exclui das condições de elegibilidade previstas no art. 1º, da Lei nº 9.474, de 22 de julho de 1997.

- Devidamente notificado, o solicitante recorre daquela decisão ao Excelentíssimo Senhor Ministro de Estado da Justiça, nos termos do art. 29, da Lei nº 9.474/97, sem aduzir qualquer fato novo que torne o caso passível de reapreciação em grau de recurso.

- Nos termos do art. 18, § 1º do Regimento Interno do CONARE, o recurso não possui qualquer fundamento de fato ou de direito, que enquadre o requerente em qualquer dos critérios de elegibilidade previstos no supracitado diploma legal, motivo pelo qual não deva prosperar.

- Portanto, do exposto, s.m.j., propomos seja mantida a decisão do Comitê que indeferiu a solicitação do reconhecimento da condição de refugiado do recorrente, por falta de amparo legal.

Brasília, de novembro de 2011.

[REDACTED]
Coordenador-Geral / CONARE

Mrs Z formalized her appeal in June 2010. As part of the appeal process, CONARE's coordinator was asked to produce a further justification report. In the document above we find Conare's answer to Mrs Z's appeal, in which Conare's general coordinator restates the reasons for denial. The original decision taken by the committee, 'which denied the request for the recognition of refugee status of the claimant for lack of legal support' must be maintained, the document states.

Notice that, at this point in the decision making process, the reason given for denial doesn't match the justification given by GEP anymore, even though the plenary continues to claim to be following the GEP's recommendation when ruling for denial.

As we have seen, the legal recommendation produced by GEP mentioned narrative inconsistency, lack of legal fit and lack of empirical support to justify the conclusion that Mrs Z's request was motivated by economic migratory drives. Here, the negative assessment originally built on three criteria is reduced to a simplified version. A generic reference is made to lack of legal support. To justify the maintenance of the negative decision, CONARE'S general coordinator stresses that the plenary followed the recommendation of its group for preparatory studies. He says that 'the appeal does not possess any support in fact or in law'.

Here the discrepancy in the standard of proof demanded from examiner and asylum seeker is becoming visible. Having my sceptical challenges in mind, it would seem that the justification for denial offered by Conare so far is just as open to questioning as the justifications given for Mrs Z in support of her claim. Yet, in spite of that, as the procedure moves into an appeal, it falls to Mrs Z to convince the GEP that there is enough support 'in fact or in law' to reconsider her case. During the appeal stage, it becomes Mrs Z's responsibility to prove that the appeal possesses support in fact or in law, even though Conare has not fulfilled this requirement when it denied the request in the first instance.

Ministry of Justice
CONARE – National Committee for Refugees

Reference: DELEMIG/RJ 05624.014568/2010-19

Illustrious Mr State Minister of Justice,

- Mrs Z., citizen of the Democratic Republic of Congo, asked CONARE for the recognition of her status as refugee in the terms of LAW 9474/97, from 22 July 1997.
- Submitted to the Committee's appreciation, the claimant's request has been denied, as **the plenary understood** that the reasons underpinning the request did not fit the eligibility criteria fixed by article 1, Law 9474/97.
- Unsatisfied, the asylum seeker appeals the decision, consonant to article 29 from the above mentioned law, **without producing any new fact or argument to justify the revision of the initial denial.**
- Therefore, for all said, I submit to the high appreciation of your Excellency a proposal for the maintenance of the negative decision being appealed.

Brasilia, November 2011.

CONARE President



Ministério da Justiça
CONARE - Comitê Nacional para os Refugiados

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Referência: Processo DELEMIG/RJ [REDACTED]

Excelentíssimo Senhor Ministro de Estado da Justiça,

- [REDACTED] nacional da República Democrática do Congo, solicitou ao Comitê Nacional para os Refugiados - CONARE, o reconhecimento do "status" de refugiado nos termos da Lei nº 9.474, de 22 de julho de 1997.
- Submetido à apreciação do Comitê, o pedido do recorrente foi negado, por entender aquele Órgão que as razões que fundamentavam o pleito não se enquadravam nas condições de elegibilidade previstas no art 1º da Lei nº 9474/97.
- Inconformado, recorre daquela decisão, consoante as disposições do art. 29 do supracitado diploma legal, sem aduzir qualquer fato ou argumento que justifique a revisão do indeferimento inicial.
- Portanto, do exposto, submeto o presente à elevada consideração de Vossa Excelência com a proposta de manutenção da decisão recorrida.

Brasília, de novembro de 2011.

Presidente do CONARE

When Mrs Z's appeal arrives at the desk of the Justice Minister, the inversion of the standard and burden of proof are consummated. Mrs Z has been held to a standard of proof that examiners themselves have not upheld. Had Conare demanded the same standard of proof in its justifications for denial, the benefit of doubt might have been given and the case might have been accepted. Yet, the principle of 'in doubt for the refugee' has by now been turned on its head. It has become Mrs Z's responsibility to bring in new significant information to justify a reviewing of the initial ruling. There is no mention to the fact that the initial judgment was based on what in principle would be disputable assessments of legal fit, empirical support and narrative consistency. Whereas the general coordinator sees the plenary as following the GEP's recommendation, CONARE's president makes reference to 'the plenary understanding'. The moment of relevant assessment is displaced once again. The generic formulations 'for all said' glosses over it. The minister can finally dispatch. It is not surprising that it only takes two lines.

Justice Ministry
Minister's Cabinet

Dispatch by the Minister
On 18 November 2011

Appeal N*1760 – In regards to process number 05624.014568/2010-19. Claimant: Mrs Z. In agreement to article 29, Law 9474/97, I dismiss the appeal.

Jose Eduardo Cardozo
Justice Minister

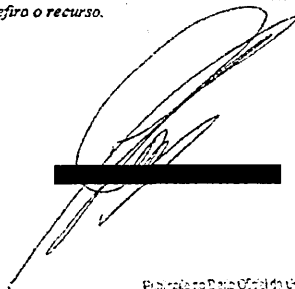
Published on the Union's Official Diary on November 2011

It cannot be emphasized enough that, in principle, all the justifications for denial offered by Conare would be susceptible to the sceptical challenges I have introduced so far. Yet, when the procedure gets to this stage, none of these seem to matter anymore. Phase work has worked. All the potential for dissent is left behind, deferred to a pivotal moment of definition that never took place. What we are left with is a proper, strictly 'declaratory' and 'properly founded' ruling, just as the law demands.

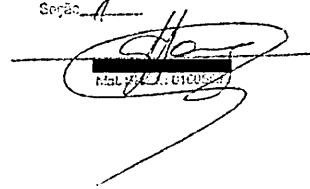
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DESPACHO DO MINISTRO
Em 18 de NOVE MBRO de 2011.

Nº 1490 - Ref.: Processo nº [REDACTED] Interessado: [REDACTED] Nos termos do
art. 29 da Lei nº 9.474/97, indefiro o recurso.



Publicado em 21/11/2011
Seção 1


[REDACTED]
Mat. nº 1.010.554

Beyond discretion

The idea that there is a moment when all the info is taken into consideration reinforces the aura of balanced reasoning behind the official ruling. It encourages the perception that the negative decision has been arrived at after a careful assessment of consistency, legal fit and empirical support. This oscillation, I have been arguing, should not be dismissed as convoluted speech. By deferring potential sources of dissent to this elusive where/when, this way of talking about decision plays an important role in bringing the determination procedure to its practical closure.

So far, I have relied on Mrs Z's case to unpack this game of avoiding potential sources of dissent by deferring them to an elusive moment of resolution. In this section, I want to bring the argument together around my suggestion that the way some migration and border scholars treat decision 'as something decision makers do at some point' is politically disempowering.

As mentioned earlier, some authors writing on migration and borders have also arrived at the conclusion that decisions on who is welcome or unwelcome into the political community are not founded on law and evidence. The way they support this conclusion and the implications they derive from it are, however, very different from mine.

Let me give an example. In 2014, the Journal of Refugee Studies published an article by scholar of migration Adam Saltsman under the title *Beyond the Law: Power, Discretion and Bureaucracy in the Management of Asylum Space in Thailand*. At first sight, Saltsman's research has a lot in common with mine. Like me, Saltsman is interested in how the decision on who is a refugee is arrived at beyond the official image of status determination. Like me, Saltsman chooses to approach this question as a practical problem, examining the functioning of Thai camps to get a sense of how the difference between refugee and other migrants is performed by 'street level bureaucrats'. Where our approaches start to part is in the centrality Saltsman gives to the discretion he believes is yielded by these bureaucrats. One of his subtitles says everything: 'Where the Law Ends, Discretion Begins'.

While discretion is fundamental in the translation of law and policy into practice and is a key part of a street-level bureaucrat's job, it nevertheless reinforces the extent to which protracted refugee situations are extra-legal spaces set apart; a zone of exception in which interconnected groups of power brokers enact their interpretations of asylum space, refugee identity, and state sovereignty upon the bodies of forced migrants.²¹³

'Where the law ends, discretion begins'. Saltsman is not the only author in the migration literature to follow this syllogism. Establishing this connection between lack of legal foundation and discretion is a reaction adopted by many authors in the migration literature.²¹⁴ From the conclusion that the decision on who is entitled to refugee protection is not founded on the proper bedrock of law and evidence, they derive the conclusion that the decision is made on a discretionary basis.

Institutional discretion is a potent force mediated by the underlying values, stereotypes, and assumptions authorities harbour and develop regarding their subjects as well as by the material constraints exerting pressure on these authorities.²¹⁵

Adopting this reaction usually works as an invitation for sociological research of a fairly standard kind. If we want to account *for how examiners decide as they do*, we need to study how the decisions these individuals make are informed not by 'regulations or laws but their own categorizations, rules and values derived from ambiguous stereotypes nurtured by officers' experiences and social prejudices'. The outcome of these studies usually takes the form of listing the underlying sociological prejudices and dispositions, which are taken to inform the perceptions that examiners form of asylum seekers.

Note that, in this picture, the basic understanding of what is a decision doesn't change much. We are still talking of a distinction between migrant and refugee been defined by a set of decision makers. Just now, instead of vehicles for law and evidence these decision makers are characterized as mouthpieces to prejudices, stereotypes and bureaucratic pressures, to which they are subjected due to their social positioning.

I find the acceptance of this basic understanding of decision politically disempowering. As I sought to illustrate by looking at Mrs Z's case, even though

the case progresses towards a closure, the potential for dissent is still there. Sources of controversy relating to the measurement of legal fit, empirical support and consistency have not been settled.

As the decision-making process moves towards closure, however, we end up with the perception that these problems have been dealt with and that decision for denial has been properly founded. Part of how examiners are brought to this perception is practical (the order interviews are arranged, questions are asked, how much evidence is collected and so forth). But part of how closure is achieved is also rhetorical. This rhetorical aspect, I want to suggest, involves the reproduction of the understanding of decision as a pivotal event.

This is where the politically disempowering effect of this centred way of conceiving decision comes to the fore. Authors like Saltsman substitute the conclusion that decisions are not founded on law and evidence with the conclusion that they are discretionary acts, founded on examiners' socially acquired dispositions and prejudices. This reaction criticizes the official image of status determination but doesn't problematize the underlying model of what a decision is. Because it doesn't problematize this underlying model, it ends up reinforcing the centred understanding of decision that is turned into a rhetorical resource in examiners' talk as part of phase work.

Take Mrs Z's case again, for instance. Conare's coordinator says that the assessment of whether Mrs Z is a migrant or a refugee happened at GEP. Then he says that the moment in which the real decision was made was at the plenary meeting. The where/when of this moment of definition remains elusive. My point is that this oscillation is facilitated because we are in the habit of thinking of decisions as taken by deciding subjects in a pivotal moment to start with.

The way Saltsman criticizes the official picture of status determination help us move beyond the idea that decisions are founded on law and evidence. But when it replaces the bedrock of law and evidence for the bedrock of discretion/social dispositions, it also inadvertently feeds this basic assumption of what a decision is. By doing so, it lends authority to the event-centred understanding of decisions, which, when turned into a rhetorical resource by examiners, contributes to foreclose potential sources of dissent.

Closure as a practical achievement

June 2010: Mrs Z enters the Cáritas office in Tijuca and fills out an asylum request questionnaire. December 2011: a resolution is published, stating that Mrs Z's appeal has been denied. What happened then? What happened in the meantime between claim and decision that can account for this negative ruling?

[A procedural handbook] The eligibility officers report to the Group of Preparatory Studies, formed by representatives of Conare, the Foreign Affairs Ministry, UNHCR and Civil society. This group prepares a legal opinion on whether to grant or deny asylum. This opinion is then forwarded to decision by the full Conare plenary, where the case is discussed and has its merits appreciated. If the decision is positive, the applicant registers with the Federal Police and receives documentation as a refugee. If the decision is negative, the applicant has 15 days after notification to leave Brazil [...].²¹⁶

The declaratory picture of status determination maintains that decisions on asylum requests are arrived at by disclosing the case's anterior strength through an assessment of legal fit, empirical support and consistency. A decision is taken after the legal opinion forwarded by the GEP has its merit appreciated. The plenary meeting in Brasilia is described as the pinnacle of all the previous determination steps.

I have been arguing in this study that this way of accounting for decisions is misleading in all its aspects. Taken together, my chapters point to the conclusion that it is not possible to isolate a pivotal moment when the distinction between economic migrant and refugee is established. There is no set of deciding subjects who get together at a decisive event and define whether an asylum seeker is to be recognized as a refugee or not. During status determination, the border between migrant and refugee is a heterogeneous and decentred achievement. Of course, a final ruling is issued at the plenary meeting. But the coordination work that steers the process is happening all over, in many contingent and heterogeneous ways. Reducing an asylum decision to the final assessment and ruling published by the Conare plenary gives too much weight to the final pronouncement. In an enactment approach, asylum decisions are decentred. If they continue to appear pivotal, this perception is what we need to account for.

That is the issue this chapter set out to address. If we adopt an enactment approach, what are we to make of this event that takes place in Brasilia, when plenary members sit together and make a decision on Mrs Z's request?

In this chapter, I have drawn on the notion of phase work to offer an initial answer to this question. I have sought to explain this puzzling situation by studying closure as both a practice and a rhetorical achievement. I have argued that the official ruling produced in Brasilia is not decisive in the sense of being technically conclusive. It doesn't solve potential sources of controversy that could be raised in legal and empirical grounds. Instead, this ruling is itself part of the work of achieving closure. It contributes to diffuse among the parts involved in the case the perception that the relevant sources of controversy 'have been dealt with' and that examiners 'are in a position to decide'.

When we understand closure like this, talk of decision as 'something decisions makers do at some point' acquires a new relevance. As Lynch and his colleagues put it, this centred way of talking about decision is itself a discursive element in the work of producing closure.²¹⁷ In Mol and Berg's terminology, this centred way of conceiving decision can be seen as a discursive device that has the effect of 'appeasing' tensions between alternative ways of enacting the case. Along with the practical moves mentioned in the previous chapters (diffusing one determination apparatus as the go-to apparatus and arranging determination practices in a specific order), talk of a decisive moment allows the procedure to move on without regard for the continuous potential for dissent.

To put it in another words, the fact that the determination procedure arrives at a ruling is not to be mistaken for the fact that the case's weakness has been demonstrated in any conclusive way. Instead, it is possible to arrive at this official resolution because the potential sources of dissent are – not overcome, I insist – but, as Lynch et al put it, gradually shut-down. This way of phrasing takes care not to attribute this shutting down of the controversy to any form of proof. The procedure is closed not because a pivotal decision has been made, but rather in the sense that the enactment of the case as weak becomes diffused among practitioners and gets to inform the official ruling.

This way of understanding closure not only challenges the idea that decisions are made by examiners after a rational appreciation of the case's content, but it also avoids the other side of the coin, which is represented by an emphasis on discretion. Phase work is a way of allowing the determination work to continue by hiding the potential for dissent, which is not the same as fixing this potential for dissent through a discretionary decision. It is important to remember the cautionary note I have been making against substituting the idea that decisions are based on law and evidence with the idea that decisions are discretionary.

To replace law and evidence with discretion leaves unchallenged the underlying understanding of decision. When we say that asylum decisions are extra-legal, we put in check the idea that asylum decisions are arrived at after a careful assessment of consistency, empirical support and legal fit. But we are also retaining the basic understanding of decision as a ruling made *by* examiners (now accounted for in terms of prejudices and social dispositions) *at* some point. By adopting the emphasis on discretion, this move risks lending authority to the same centred understanding of decision on which phase work relies to foreclose dissent about the justifications examiners give for denial.

Enacting Refugees

How can a western and democratic country like Brazil tell the difference between migrants and refugees? This question brings together all the stories I have told so far. In exploring this topic, my aim has been to make room in the scholarship on migration and borders for an alternative way of thinking about decisions – a way that is more comfortable with the contingent, heterogeneous and decentred manner in which the distinction between migrant and refugee is enacted. In this conclusion, I arrange the arguments developed earlier around the three themes that were present throughout the study – scepticism, enactment and decentring – before discussing how they brought me to reconsider the authority of my own account.

Encouraging Scepticism

It is common to read in justifications for denial that examiners were not convinced by the reasons given by asylum seekers in support of their claim. What happens if we invert scepticism and ask whether the justifications given for denial fare any better?

To invert the direction of doubt, this study tied ethnographic stories with arguments borrowed from science studies and other fields that study knowledge-making practices. By reworking arguments developed in this literature into the discussion on status determination, I sought to take issue with the declaratory picture of asylum decisions, which relies on criteria like ‘lack of legal fit’, ‘want of empirical support’ and ‘narrative inconsistency’ as justifications for denial.

The measurement of legal fit was the first aspect of the declaratory picture that I sought to problematize. The assumption at stake is that it is possible to determine whether a foreigner is a migrant or a refugee by considering whether this foreigner’s case meets the refugee definition fixed in law. To dispute this

assumption, I relied on the concept of strong indeterminacy derived in science studies from the work of Wittgenstein, which challenges justification for action in terms of rule-following.

To speak of the refugee definition as indeterminate is to acknowledge that there is something about this definition that makes it insufficient as a guide for action. The difference between a weak and strong form of indeterminacy has to do with this phenomenon's source and reach. The weak form of indeterminacy is more familiar to determination practitioners. Its terms are also closer to the scholarly debate on the distinction between migrant and refugee.

In its weak form, indeterminacy is tied to the vague and ambivalent way in which the refugee definition is phrased. An example is furnished when examiners find themselves at a loss on whether to read 'well-founded fear' with an objective or subjective spin ('a fear that is well-founded in facts' as opposed to 'a convincingly demonstrated presence of the subjective quality of fear'). In what concerns its reach, this form of indeterminacy is weak because it is circumscribed to so-called 'hard cases', which leaves open the possibility that it might be overcome as the definition becomes more precise and further clarified. This weak form of indeterminacy is closer to the scholarly debate on migration because it is possible to envisage it being overcome through further specification (as Hathaway tries to do in the discussion on whether refugees and migrants are distinct categories, when he redefines the distinction between refugees and migrants in terms of disfranchisement and unqualified access).

Going beyond this weak form of indeterminacy, the reason I am sceptical of the idea that it is possible to decide on a request by following the law has less to do with ambivalence and vagueness in law and more to do with the act of following law. To be able to justify a decision in terms of rule following ('we decided for denial because that is what the refugee definition compelled us to do'), examiners would have to come up with some sort of proof to show that, in taking this negative decision, they were observing the intended meaning of the refugee definition. The strong form of indeterminacy I articulated questions the examiners' capacity to provide any such proof that their decisions are aligned to the intended meaning of the refugee definition. It suggests that attempts to show

intended meaning are constrained by the fact that the number of instances in which the definition has been used before is finite. Given a committed enough dissenter, these instances of past use can be shown to agree with a new and alternative reading. The practical consequence of this is that examiners have no way of showing that a decision for denial is in fact following the definition.

This leads me to a second aspect of the declaratory picture of status determination: the notion of empirical support. Even among those examiners who concede that the refugee definition is weakly indeterminate, many would insist on the possibility of deciding by relying on an assessment of empirical support. If a request is supported by evidence and is corroborated by the known facts, then this is a sign that the request is strong and the foreigner is to be recognized as a refugee. Conversely, if there is little empirical support and if the statements made by the asylum seeker go against what is known about the country of origin, then examiners take this as an indicator that the case is weak and that the asylum seeker is probably better characterized as a migrant of some other kind. This trust on empirical support as a guide for decision is the second aspect of the default picture that I sought to problematize.

The use of empirical support as an indicator for decision is built on two premises. First, it assumes there is some sort of objective reading of the evidence on which examiners can rely to tell which course of action this evidence encourages. Second, it also seems to assume that this objective criterion allows examiners to differentiate courses of action in terms of whether they are supported and non-supported by the evidence. So, for example, in Mr G's case, it would be possible to decide between a positive or negative decision by using evidence as an arbiter to choose between acknowledgment and denial. The recommendations made in favour and against Mr G's request would be crossed against each other and the empirical evidence gathered would allow examiners to tell which proved more supported. To take issue with these premises, I relied on the arguments in favour of symmetry and on the notion of experimenter's regress developed in science studies.

Let me start with the argument for symmetry. When examiners justify a decision saying that 'this is a decision that the evidence encouraged us to take',

they are claiming access to the objective reality of the world. When the case is acknowledged as complex, factors like the examiner's background, prejudices and social interests are accepted to impair the assessment other examiners make of this objective world. When the case is deemed straightforward, however, it is often assumed by examiners that they have found a way to reach the unimpaired version of this objective reality.

The argument for symmetry calls into question the possibility of arriving at objective knowledge free from the interference of non-legal and non-empirical factors. It is built from the conviction that, in both cases – when the case flares up in controversy but also when it is decided straightforwardly – decision are not arrived at by letting the case's content to speak for itself. Whether this becomes an issue or not, in order for a decision to be arrived at, some degree of concerted perception is required around issues like 'what counts as reliable evidence?' and 'how much evidence is enough?' As Bloor tells us, asymmetric accounts are problematic because they hinder the study of how these concerted perceptions are achieved in practice.

This argument in favour of symmetry is closely related to the second insight I adapted from science studies to problematize accounts in terms of empirical support: the experimenter's regress. The thrust of this argument is in the insight that at stake during status determination is not only the question of which recommendation is more supported by evidence, but also the question of 'how to assess which course of action is more supported by evidence'. What evidence is reliable and what is not? What aspect of a report deserves to be highlighted and what can be ignored? How much evidence is enough? These background questions are all at stake *during* the work of status determination. The consequence this has on how we seek to account for decisions is that any argument that invokes empirical support as justification can be brought into a regress if the basis for the assessment of this empirical support happens to be questioned. Take Mr G's case, for example: GEP members could not agree if the photo and medical reports were reliable and so could not agree on whether these elements provided empirical support for Mr G's claim or not. As there is no agreement on what counts as reliable evidence, there can be no agreement on

whether the case is supported by evidence. Logically speaking, this regress can go on for ages. The notion of experimenter's regress directs our attention to the social and material factors that bring examiners to stop arguing.

With the notion of regress in mind it is easier to understand why the use of consistency as an indicator of credibility is problematic. If we phrase it with an epistemological spin, the issue can be explained as a technical challenge related to replication. The scientists in Collins's study need to be able to show that they are reproducing identical laboratorial conditions in order to claim that results have been replicated. Likewise, case examiners need to be able to show that they are examining the same underlying case (that they are replicating the same way of putting the case together), so they can rely on consistency to decide. As with the experiments conducted by Collins's scientists, however, the determination practices conducted by examiners are never identical. Examiners cannot be sure that they are examining the same case (the same gathering of evidence, legal documents, interview transcripts, country reports and so on) and so have no reasonable basis to say whether the outcome of these practices suggests consistency or inconsistency.

A more ontologically attuned way of explaining this would be to say that the use of consistency as an indicator of credibility takes as a starting point a questionable assumption of ontological singularity. It presumes that all practices are looking at the same case (at the same gathering of ways of doing interviews, of legal texts, of evidence and so on), whereas the case enacted in these different practices is never exactly the same. There is no one same and single case that all determination practices pivot around. What there are, instead, are different and partially overlapping ways of enacting the case in different practices. If, in spite of these different ways of putting the case together, we still have the impression that the case is the same in all practices, then this appearance of singularity is what needs to be accounted for.

Take Mr E's case, for example. The way of putting Mr E's case together at the Federal Police (its enactment as an affidavit, so to speak) and the way of putting Mr E's case together in *Cáritas* (its enactment as a questionnaire) were deemed consistent to each other. Conare concluded that the enactments of Mr

E's case that emerged out of these practices encouraged the same ruling: 'Mr E is an economic migrant and not a refugee'. Still, to paraphrase IMDH's social worker, there is only so much we can deduce from this. All that this lack of disagreement shows is that the ways of enacting this condition *that were actively bridged* happened to agree. The possibility remains, however, that other ways of enacting the case that could lead to a different assessment were displaced and thus *not actively bridged*.

Again, it is important to keep in mind that my sceptical challenges are not restricted to those cases that examiners characterize as legally hard or empirically controversial. My scepticism about using legal fit, empirical support and consistency as indicators for decisions extends to those cases taken as legally easy, empirically straightforward and clearly inconsistent. Even in those cases in which examiners agree that the decision to deny the request was the right one because the case clearly lacked legal fit, empirical support and consistency, *referring back to these intrinsic qualities is not enough to account for how this negative decision has been arrived at*. The difference between migrants and refugees is often debated with an eye to its legal basis and sociological soundness, as well as to its ethical and policy implications. These sceptical challenges show that asking this question gets us entangled with rather powerful formal and methodological challenges as well. They affect not only the distinction when considered in abstract. They cut against some entrenched assumptions about what a decision is and how it can be justified.

To be clear, I encourage scepticism about the use of legal fit, empirical support and consistency as indicators not as an end in itself but as an argumentative device. My aim in encouraging scepticism toward the policy's inherited understanding is to open space for an alternative way of looking at how the border between migrant and refugee is enacted. These sceptical arguments open up this space by inviting an analysis of the social and material factors that lead a case to emerge as weak, and thereby lead the decision for denial to come across as the right one. To illustrate what this change in methodological sensibility looks like was my reconstructive aim in this study. To

capture what is at stake, I have established a contrast between a declaratory and an enactment way of approaching status determination.

An enactment approach

To speak of the asylum decision as *recognizing* strength and *declaring* status is not an innocent nuance of legal jargon. It is to insist on ontological assumptions about the anterior nature of the case's reality and in epistemological assumptions about what we can learn from it. In the declaratory approach, the work of status determination is supposed to *disclose* the strength of the case and, in this way, declare the anterior reality of the asylum seeker. As this default picture goes, the asylum seeker either is or isn't a refugee before status determination begins. This reality is set before the determination work starts. 'Asylum seekers do not become refugees because of recognition, but are recognized because they are refugees'. If free from bias, the work of assessing legal fit, empirical support and consistency is supposed to bring examiners as close as possible to the pre-determined right answer to the question of whether to accept or deny the request.

In contrast with the image of asylum decisions as declaratory, I argue for the treatment of status determination as enactment work. Instead of taking determination practices to be disclosing the strength of the case as if this strength had been defined before and independently of the determination work, an enactment approach focuses on how what counts as the case's anterior reality is defined *in* the determination practices. Latour spells out succinctly the driving insight behind this change in outlook: 'Since the settlement of a controversy is the cause of Nature's representation, not its consequence, we can never use this consequence, Nature, to explain how and why a controversy has been settled'.²¹⁸

One of the things that an enactment approach highlights is that this anterior and independent reality is not as present during the determination work as one might assume. Examiners don't go to Angola or Colombia to assess whether the asylum seeker is telling the truth. They are informed about the condition in the country of origin through representations of the situation in these countries, to which they have access through humanitarian reports. The body and voice of

the asylum seeker, which are present in the initial stages of the determination work, are quickly turned into representation as well, inscribed in fingerprint slabs and photographs. Asylum seekers don't tell their stories in person during the GEP and plenary meetings. Examiners read what becomes accepted as their stories as they are written down in questionnaires and transcripts. Noticing all this is, of course, nothing new. What *is* new, perhaps, is the realization that access to the reality of the case is *always* mediated in this way. When combined with the notion of regress, this realization has crucial consequences for how we conceive the determination work.

To make the point less abstractly, consider Mr G's case again. The recommendation for denial offered by the Conare officer was that Mr G's reality is not that of a refugee. During the work that led him to this conclusion, this officer didn't check Mr G's case against an unmediated world out there. He checked it instead against a very particular representation of this reality, to which he arrived by relying on a very particular determination apparatus. This examiner makes reference to interviews made in a certain way, to a specific list of humanitarian reports and legal documents, to a particular compilation of facts about the country of origin, to a judgment of consistency derived from a particular arrangement of hearing and so forth. When this officer states that, after studying Mr G's case, he concludes that Mr G is not a refugee, he is asking us to accept that this is a reliable determination apparatus and that he has conducted the determination work in the proper way. The questions of 'which representation of the case's anterior reality is right?' and 'which way of bringing out this anterior reality is proper?' are answered together. And so it seems that there is no objective point on which examiners can stand to say which representation of the case's anterior reality is the 'actual' one 'out there'. If the conclusion that Mr G is not a refugee is accepted, this is because the way of enacting the case advocated by the Conare officer happened to become the one used to inform the ruling.

Keeping in mind the commitment to symmetry, it is important to remember that this sceptical challenge applies also to the case that examiners characterize as straightforward. The declaratory picture encourages us to believe that, at least

in straightforward cases, a negative decision can be justified because the case has been contrasted against the anterior and independent reality and shown to be weak. The problem with this is that if we are to trust this assessment, we need to trust that the work of disclosing this reality has been well conducted, while, at the same time, if we are to trust that this work has been well conducted, we need to trust that its results correspond to the reality.

Here we can finally make sense of the misleadingly trivial suggestion that status determination doesn't consist in declaring the anterior reality of the case but rather in enacting what counts as this anterior reality. The acceptance of a particular version of the case as its anterior reality and the acceptance of a particular determination apparatus as the proper way of getting to this anterior reality happen together. They are co-extensive processes, as Collins and Law put it: as the apparatus becomes accepted as proper, the 'anterior' reality that comes with it becomes accepted as well.

Approaching status determination with this outlook has direct practical consequences for how we can hope to account for asylum decisions. If a case is dismissed as weak, this conclusion cannot be accounted for by saying that the case was dismissed because it was weak. Even in a decision deemed easy and more evident, if a case comes across as weak, this says more about the success of the determination apparatus that brings the case to emerge as weak than about a presumed correspondence with the anterior reality of the case. Translated in the practice of ethnography, if we want to get a sense of why a case is decided one way or the other, it becomes necessary to pay attention to how apparently insignificant changes in the array of people and things put together during determination practices affect how the case emerges.

Perhaps the best way to explain why adopting this approach makes a difference is to contrast it with the way some borders and forced migration scholars rely on the notion of discretion to account for asylum decisions. Their starting point is concisely captured in Saltsman's quip that 'where the law ends, discretion begins'. In this approach, the insight that the distinction between refugees and non-refugees has no bedrock in law and evidence is taken as a springboard for the study of the socially received stereotypes and bureaucratic

pressures that inform examiners' dispositions. In a first step, this reaction consists in 'challeng[ing] the notion that status determination is a process enclosed within official proceedings'.²¹⁹ In the second, it concentrates on showing how discretion is 'mediated by the underlying values, stereotypes, and assumptions authorities harbour and develop regarding their subjects as well as by the material constraints exerting pressure on these authorities'.²²⁰

This reaction shares its starting point with the enactment approach for which I argue. Adopting an enactment approach also involves accepting as a methodological principle that reference to qualities supposed to be intrinsic to the case, like consistency, legal fit and empirical support, is not enough to account for the case's outcome. The adoption of this enactment approach takes us in a different direction than this discretion approach, however, when it comes to the underlying model of decision with which it works.

The image of decision makers exercising socially-informed discretion to decide on requests retains a 'centred' understanding of decision already present in the declaratory picture. Instead of vehicles for law and evidence, these deciding subjects are characterized as conduits to socially acquired prejudices, stereotypes and bureaucratically encouraged dispositions. But whether the asylum seeker is acknowledged as a refugee or classified as a migrant is still traced back to a decision taken by a set of decision-makers. It is this centred understanding of decision that the enactment approach seeks to avoid.

Decentring Decision

Let us consider the question of where and when the distinction between refugees and migrants is brought about. According to the default declaratory picture, the many practices that take place during status determination flow into the moment of the decision. They are steps in the road toward the final ruling. In this way of looking at status determination, there is a difference in gravity among the ordinary determination practices, like doing interviews and collecting fingerprints and the final political decision that is taken by plenary members in Brasilia. The politically relevant moment is mainly circumscribed to this pivotal event.

In an enactment way of looking at status determination, the balance is inverted between these ordinary determination practices and the moment of official decision. Stress is placed on these much smaller, apparently insignificant aspects of determination practices, which might make a difference for how strong the case emerges.

Take Mrs A's case, again – the Congolese mother, who entered *Cáritas* carrying her daughter with her. The justification letter sent to Caritas tells us that the plenary members discussed the case and voted for denial. The justification they offered for this negative decision states that plenary members have considered the relevant information and concluded Mrs A's case 'did not possess support in fact or in law'.

If we stick to this justification, what we see is a ruling being arrived at after the information collected in the previous determination steps has been put together and transferred to the plenary meeting (pivotal moment) where plenary members (deciding subjects) assessed the evidence and brought the case to a vote.

What stays out of sight is the mundane work of downloading some humanitarian reports but not downloading others; the tone of voice with which Mrs A has been interviewed or the fingerprinting device that didn't work. Perhaps the examiner writing the legal recommendation missed just that treaty or report that would increase its legal and empirical support. Perhaps, if Mrs A had been allowed to tell her story freely instead of being posed questions by the police marshal, her story would emerge as perfectly consistent. Perhaps, if Mrs A had talked to a psychologist before being interviewed by Conare, the fact that she misplaced her father's date of death by one day wouldn't come across as so significant after all. All added up, little contingent matters like these might make the difference between Mrs A's case emerging as strong or emerging as weak. But they are kept out of sight when we insist in pinning down the act of demarcating migrant and refugee to a particular where and when, to a pivotal moment in which contingency is supposed to have come to an end.

A consequence of questioning the centrality of the official decision is that the perception that there are deciding subjects arriving at decisions in pivotal events

needs to be turned into a topic in itself. To talk of decentring decision is, of course, not to deny that there are actors and moments that come across as decisive, as with the decision makers voting the case at the plenary meeting. Entailed by the notion of decentring are two much humbler insights.

The first suggestion is that this appearance of being decisive that exists around the ruling taken in Brasília is something that needs to be enacted itself. It is retained, among other things, by dint of a subtle rhetorical play of postponing and invoking the moment in which the potential for dissent is supposed to be dealt with.

The second suggestion is that, if we want to grasp how migrants are distinguished from refugees during status determination, we need a decentred understanding of decision to be able to appreciate the influence exerted by heterogeneity and contingency over asylum decisions. During status determination in Brazil, the border between welcome and unwelcome foreigner is an interactive achievement. It is enacted when people talk and write to each other. It is affected by the way things behave. It is being enacted here and there, now and then. It is an effect of a much messier process than the image of declaratory decision allows us to appreciate.

Approaching status determination as enactment involves challenging the policy-inherited understanding of decisions as rulings taken by examiners after a rational appreciation of the case's content. Beyond that, however, it also requires us to avoid the flipside of this picture, which is represented by the image of examiners establishing the border in an exercise of socially-informed discretion. To substitute law and evidence with discretion leaves unchallenged the underlying understanding of decision. It problematizes the idea that asylum decisions are arrived at after a careful assessment of consistency, empirical support and legal fit. But it also retains the basic metaphor of decision that underlies the declaratory picture. Whether the asylum seeker is acknowledged as a refugee or classified as a migrant is still traced to a judgement made by a set of decision-makers. As intuitive as this image might sound, by reinforcing it, we risk lending authority to the same event-centred understanding of decision that forecloses the possibility of dissent in the face of denial.

Writing Reflexively

If a case comes across as weak, this outcome is not convincingly accounted for by pointing to a supposedly intrinsic weakness of the case. This, I have contended, is just as valid to those cases taken to be straightforward as it is to those cases that examiners acknowledge as complex. The social and material factors that bring about a case as weak deserve to be examined not only when the case is deemed hard and the decision is questioned as wrong. The particularities of the array of people and things that goes into establishing a negative decision merits examination perhaps *especially* when the decision is accepted as correct and the case is deemed straightforward.

But what happens if I turn this insight towards my own account? I would be the first to concede that this study is no less dependent on the array of people and things out of which it emerges than are the cases enacted during status determination. Just like the work that goes into enacting a case and bringing about a ruling, the work that went into producing this account involved an endless number of small contingent turns.

In the day-to-day tasks of status determination, I have argued, the aspects of a report that are highlighted and those that are downplayed might be the difference between a strong and weak enactment of the case. In the day-to-day task of writing a dissertation, the same could be said about what aspects of the practices described are made quiet and what aspects are brought to the fore. In the day-to-day procedure of status determination, whether a hearing with a social worker comes before or after the interview with Conare might make the difference between a consistent and an inconsistent case. In the day-to-day task of thesis writing, the same could be said about the way sections are divided and chapters are arranged.

I could continue with the parallel, but the point will be clear enough by now. As sociologists of science Latour and Woolgar once put it, I don't think there is any 'essential distinction' between the account I give and the default one I have sought to problematize.

Now, in acknowledging this, am I not arguing against myself? After all the work to encourage scepticism and defend an enactment approach, am I not pushing the rug from under my own feet? How can I convince someone to study asylum decisions with enactment lenses if I am the first to admit that whether my account is deemed strong is not defined by how well it corresponds to what really happened in Brazil? At worst, I would be a self-refuting fool, unwittingly undermining the basis of my own work. At the very least I am a hypocrite, a half-hearted defender of symmetry, compelling others to consider the contingency and heterogeneity behind the success of asylum cases while invoking authority to my own account by dint of its 'improved accuracy'.²²¹

I take the point very seriously.

When accounting for where the authority of my narrative comes, it would be easy to dismiss the issue or defer it to a later stage in research. As this reaction usually goes, there would be no problem in admitting that the accounts I developed are just as tied to my position in society as are the actors I analysed. Like these actors, I am ingrained in the habits I inherit as member of the academic circle I live in. But thankfully, I could claim, this academic circle encourages self-awareness. I go into the field and do research. No matter how careful I am, my socially ingrained prejudices will usually sneak in. The objectivity of my account can be retained, however, as long as I bring my study to be objectified in the academic field.

An answer like this would make my life easier, no doubt. It taps on the appeal of science and empiricism to justify why the default picture of status determination should be debunked and my alternative picture embraced. But what happens to a statement like this if we read it as a knowledge claim itself? Why should we accept this statement as correct? In its own terms, assessing whether this statement is correct would demand objectifying it in light of my social position in the academic field. Doing this, however, implies accepting the claim that is smuggled in passing, about my capacity as an expert to delineate this field. Like the examiner who says a request was dismissed because the case was weak, the veracity of a statement like this assumes an edge in expertise to account for how this edge in expertise is to be retained.

In this study, I sought to deal with reflexivity in another way. I didn't dismiss it as a nuisance. Nor did I defer it to a second step. Instead, by stitching stories and concepts together, I sought to take reflexivity on board from the start. In adopting this writing style, I wanted to emphasize that this account is not a mirroring description. That it was not written from some sort of higher ground. In a very concrete sense, the stories I told here are mine. They are the product of my thinking with sociologists, philosophers and anthropologists. And they are also the product of my time among nuns and priests, among social workers, lawyers and asylum seekers. Telling these stories has been my way of honouring the many lessons I have learned with them.

Pictures

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Notes

Introduction

¹ According to the United Nations Office for Refugees, in 2012 there were nearly 15 million people living in camps around the world. The average length of stay is now approaching 20 years. See: UN High Commissioner for Refugees (UNHCR), "UNHCR Global Trends 2013: War's Human Cost," (2013). See also: Gil Loescher and James Milner, "Responding to protracted refugee situations: lessons from a decade of discussion " *Forced Migration Review* 33(2009).

Concerning the issue of return, the principle of "non-refoulement" is accepted as an absolute prohibition against expelling or otherwise returning refugees to a place in which their lives and freedom will be threatened or where they are expected to face persecution on the basis of race, religion, nationality, political opinion or membership of a particular social group. Over the last few years, security concerns and an alleged increase in irregular migration are being increasingly invoked to justify its violation. See: August Reinisch and Melanie Fink, "Non-refoulement and extraterritorial immigration control: the case of immigration liaison officers " in *Seminar in International Law: EU – External and Internal Security* (University of Vienna 2013), 20.; Redress Trust and Immigration Law Practitioners' Association, "Non-refoulement under threat," (2006).

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⁵⁴ The literature in Science Studies would call this an exercise in the generation of interest, or, in French, *interessment*. According to this literature, this generation of interest is commonly done through a subtle exercise of rephrasing, in which the scientist proposing a research manages to present his work as an obligatory passage point for the solution of the problem that interests the social groups whose support he is seeking to enrol. See: Michel Callon and John Law, "On Interests and their Transformation: Enrolment and Counter-Enrolment," *Social Studies of Science* 12(1982).; Bruno Latour, *The Pasteurization of France*, ed. Alan Sheridan and John Law (Harvard University Press, 1993). Michel Callon, "Some elements of a sociology of translation: domestication of the scallops and the fishermen of St Brieuc Bay," in *Power, action and belief: a new sociology of knowledge?*, ed. John Law (London: Routledge, 1986).

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⁷⁴ David Bloor, *Knowledge and social imagery*, 2nd ed. (Chicago: University of Chicago Press, 1991).

⁷⁵ Michel Callon et al., "From translations to problematic networks: An introduction to co-word analysis," *Social Science Information* 22, no. 2 (1983); Callon and Law, "On Interests and their Transformation: Enrolment and Counter-Enrolment."; Madeleine Akrich, Michel Callon, and Bruno Latour, *Sociologie de la traduction: Textes fondateurs* (Presses de l'École des mines), 2006); Callon, "Some elements of a sociology of translation: domestication of the scallops and the fishermen of St Brieuc Bay."

⁷⁶ Annemarie Mol, *The body multiple: ontology in medical practice*, Science and cultural theory (Durham: Duke University Press, 2002); John Law and Annemarie Mol, eds., *Complexities: social studies of knowledge practices*, Science and cultural theory (Durham: Duke University Press, 2002); Marc Berg and Annemarie Mol, eds., *Differences in Medicine: Unraveling Practices, Techniques, and Bodies* (Duke University Press, 1998); Annemarie Mol, "Ontological politics. A word and some questions," in *Actor Network Theory and After*, ed. John Law and John Hassard (Oxford: Blackwell Publishing, 1999).

⁷⁷ John Law, "Traduction/Trahison: Notes on ANT," (1999), <http://www.comp.lancs.ac.uk/sociology/papers/Law-Traduction-Trahison.pdf> ; Akrich, Callon, and Latour, *Sociologie de la traduction: Textes fondateurs*.

⁷⁸ For a discussion on the work that goes into achieving this style of no style, see: Nick Bingham, "Writing reflexively," in *Using Social Theory*, ed. Michael Pryke, Gillian Rose, and Sarah Whatmore (Eds.) (London: Sage, 2003); Roland Barthes, *The Rustle of Language* (Farrar, Straus and Giroux, 1987).

⁷⁹ Donna J. Haraway, *Modest Witness at Second Millennium. FemaleMan Meets OncoMouse: Feminism and Technoscience* (Routledge, 1997); *ibid.*

⁸⁰ For an excellent overview of the methodological challenges involved with the execution of multi-sited ethnography, see: Mark Anthony Falzon, ed. *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research* (Ashgate Publishing, Limited, 2012).

⁸¹ Matei Candea, "Arbitrary locations: in defence of the bounded field-site," *Journal of the Royal Anthropological Institute* 13, no. 1 (2007).

⁸² *Ibid.*, 179

⁸³ Michael Mulkay, "Action and belief or scientific discourse? A possible way of ending intellectual vassalage in social studies of science," *Philosophy of the Social Sciences* A, no. 11 (1981).

⁸⁴ If this image puzzles you, you might want to see: Jorge Luis Borges, "On Exactitude in Science," in *Jorge Luis Borges: Collected Fictions*, ed. Andrew Hurley (New York: Penguin, 1999). And for the political implications: Jean Baudrillard, *Simulacra and Simulation* (University of Michigan Press, 1994).

⁸⁵ John Law, *Organizing modernity* (Oxford, UK ; Cambridge, Mass., USA: Blackwell, 1994), 39.

⁸⁶ *Ibid.*, 39.

⁸⁷ For the notions of sovereign moment and petty sovereign, see: Agamben, *Homo sacer: sovereign power and bare life*. and Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso Books, 2006). For the inspiration of my critique of this image in favour of a

processual understanding of decision, developed in chapter 4 of this study, see: Jef Huysmans, "What's in an act? On security speech acts and little security nothings," *Security Dialogue* 42, no. 4-5 (2011).; Amoores and Goede, "Governance, risk and dataveillance in the war on terror."; John Law, *After method: mess in social science research*, International library of sociology (London ; New York: Routledge, 2004); Mol, *The body multiple: ontology in medical practice*.

⁸⁸ Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'Etat* (Wiley, 2010), x.

Chapter 1

Following the Law

⁸⁹ UN High Commissioner for Refugees (UNHCR), "Note on Burden and Standard of Proof in Refugee Claims," ed. United Nations High Commissioner for Refugees (Geneva: , Note on Burden and Standard of Proof in Refugee Claims, 1998), 3.

⁹⁰ UN High Commissioner for Refugees (UNHCR), "Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee," (2005), 4.

⁹¹ Brasil, "LEI Nº 9.474, DE 22 DE JULHO DE 1997." My translation. See also: United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Convention relating to the status of refugees, Geneva, July 28, 1951*, vol. 1954, no. 39, [Gt. Brit. Foreign Office] Treaty series (London: H.M. Stationery Off., 1954); United Nations General Assembly, "Protocol Relating to the Status of Refugees, 31 January 1967," in *Treaty Series*, ed. United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Geneva 1967).

⁹² Lawrence B. Solum, "Indeterminacy," in *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson (Wiley, 2010).

⁹³ Mark Tushnet, "Defending the indeterminacy thesis," *Quinnipiac Law Review* 16(1996): 341.

⁹⁴ Hart illustrates his point through the example of the bicycle in the park. In a legal rule that forbids the presence of vehicles in the park, 'vehicle' is such a general terms that this rule leaves indeterminate whether bicycles would be affected by this prohibition. See: H.L.A. Hart, *The Concept of Law*, ed. J. Raz, L. Green, and P.A. Bulloch (OUP Oxford, 2012), 128.;

⁹⁵ Scalettaris, "Refugee Studies and the international refugee regime: a reflection on a desirable separation."; Oliver Bakewell, "Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration," *Journal of Refugee Studies* 21, no. 4 (2008); Nicholas Van Hear, "Forcing the Issue: Migration Crises and the Uneasy Dialogue between Refugee Research and Policy," *Journal of Refugee Studies* (2011).

⁹⁶ Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?."; Guy S Goodwin-Gill, "The Search for the One, True Meaning..." in *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, ed. G.S. Goodwin-Gill and H. Lambert (Cambridge: Cambridge University Press, 2010).

⁹⁷ Although I unravel them here, it is important to notice that these arguments are usually intertwined in complex ways.

⁹⁸ Long, "When refugees stopped being migrants: Movement, labour and humanitarian protection."; B. S. Chimni, "The Birth of a 'Discipline': From Refugee to Forced Migration Studies," *Journal of Refugee Studies* 22, no. 1 (2009).

⁹⁹ Scalettaris, "Refugee Studies and the international refugee regime: a reflection on a desirable separation."; Bakewell, "Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration."

¹⁰⁰ Martin, "Making the UN Work: Forced Migration and Institutional Reform."; Roberta Cohen, "Response to Hathaway," *Journal of Refugee Studies* 20, no. 3 (2007).

¹⁰¹ Scalettaris, "Refugee Studies and the international refugee regime: a reflection on a desirable separation." Soguk, *States and Strangers: Refugees and Displacements of Statecraft*.

¹⁰² Richmond, "Sociological Theories of International Migration: The Case of Refugees."; Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization."; Scheel and Squire, "Forced Migrants as Illegal Migrants."

¹⁰³ UN High Commissioner for Refugees (UNHCR), "Refugee Protection and Mixed Migration," (2014).

¹⁰⁴ Turton, "Refugees, forced resettlers and 'other forced migrants': towards a unitary study of forced migration."

¹⁰⁵ Historic critiques charge the distinction between migrants and refugees for being motivated by managerial concerns. Hathaway inverts the historic reading and argues that the creation of a distinguished refugee protection regime was actually an attempt to favour human rights protection. Academic-normative critiques suggest that the distinction between migrant and refugee should be abandoned because refugee is too generic as a sociological category to orient research on migration-related issues. Hathaway reacts to this academic-normative critique by arguing that, even if legal status as refugee were the only feature that differentiates refugees as a social group, this would already make of the refugee category a useful one for research. Policy-normative critiques suggest that policy makers should give up the distinction because it hinders the protection of migrants at large. Hathaway reacts to this critique by inverting the concern and stressing what he sees as eerie policy consequences of abandoning the distinction. He appropriates the rhetoric of risk used by the critiques and argues that abandoning the distinction between migrants and refugees risks feeding what he describes as an overarching trend among policy makers to constrain mobility and make it manageable. Against the critiques that charge the migrant/refugee distinction for being state-centric and favouring sedentarism, Hathaway's proposes an alternative reading. He argues that the shift from refugee studies to the broader forced migration studies is problematic because it encourages a shift from humanitarian/individual-focused approach to a managerial/process-focused approach. See: Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", 354.

¹⁰⁶ Ibid., 353.

¹⁰⁷ Ibid., 353.

¹⁰⁸ Brasil, "LEI Nº 9.474, DE 22 DE JULHO DE 1997." My translation.

¹⁰⁹ United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Convention relating to the status of refugees*, Geneva, July 28, 1951, 16.

¹¹⁰ UN High Commissioner for Refugees (UNHCR), "Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," (2003), 2; UN High Commissioner for Refugees (UNHCR), "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," (2003), 24.

¹¹¹ Hathaway, "Refugees and asylum," 184.

¹¹² Hart, *The Concept of Law*, 128.

¹¹³ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 81-139.

¹¹⁴ *ibid.*, 113.

¹¹⁵ For a detailed review of this debate see Lynch: Michael Lynch, *Scientific Practice and Ordinary Action: Ethnomethodology and Social Studies of Science* (Cambridge University Press, 1997). And see also the exchange between Lynch and Bloor in: Andrew Pickering, *Science as Practice and Culture* (University of Chicago Press, 1992).

¹¹⁶ David Bloor, "Wittgenstein and Mannheim on the sociology of mathematics," *Studies in History and Philosophy of Science Part A* 4, no. 2 (1973).

¹¹⁷ Harold Garfinkel, Michael Lynch, and Eric Livingston, "1.1 The Work of a Discovering Science Construed with Materials from the Optically Discovered Pulsar," *Philosophy of the Social Sciences* 11, no. 2 (1981); Lynch, *Scientific Practice and Ordinary Action: Ethnomethodology and Social Studies of Science*; David Bloor, *Wittgenstein: a social theory of knowledge*, Contemporary Social Theory (Macmillan, 1983).

¹¹⁸ For the relation between logical compulsion and intended meaning, see: David Bloor, *Wittgenstein, Rules and Institutions* (Routledge, 1997), 27.

¹¹⁹ Thomas S. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (University of Chicago Press, 1977), 240.

¹²⁰ Martin Kusch, *A Sceptical Guide to Meaning and Rules: Defending Kripke's Wittgenstein* (McGill-Queen's University Press, 2006).

¹²¹ Saul A. Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Harvard University Press, 1982), 15.

¹²² *Ibid.*, 17.

¹²³ Ludwig Wittgenstein, *Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte (Wiley, 2010). paragraph 201a

¹²⁴ Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition*, 17.

¹²⁵ *Ibid.*, 17.

¹²⁶ *Ibid.*, 55.

¹²⁷ *Idem*

¹²⁸ The idea that 'decisions are arbitrary' has been imported into the broader literature on migration and borders through works that rely on the theories of the political philosopher Giorgio Agamben and the cultural theorist Judith Butler, with her notion of the petty sovereign. In her discussion on asylum seeking in Brazil, for instance, Carolina Aguiar describes the case examiner as the "sovereign adjudicator", who "determines whether or not an asylum seeker will be recognized as a refugee". Curiously, even Ronald Dworkin, who would be for many the epitome of the liberal legal thinker, have encouraged this conclusion, although he emphasis how indeterminacy is connected to discretion precisely to encourage us to reject indeterminacy. Carolina Moulin Aguiar, "Border Politics: Practices of Zoning, Experiences of Mobility and Life in Displacement - Views From Brazilian Crossroads " (McMaster University 2009), 55.

Chapter 2

Gathering Evidence

¹²⁹ UN High Commissioner for Refugees (UNHCR), "Note on Burden and Standard of Proof in Refugee Claims," 3.

¹³⁰ Trevor J. Pinch and Wiebe E. Bijker, "The Social Construction of Facts and Artefacts: or How the Sociology of Science and the Sociology of Technology might Benefit Each Other," *Social Studies of Science* 14, no. 3 (1984).

¹³¹ Michael Mulkey and G. Nigel Gilbert, "Accounting for Error: How Scientists Construct their Social World when they Account for Correct and Incorrect Belief," *Sociology* 16, no. 2 (1982).

¹³² Lorraine Daston and Peter Galison, "The Image of Objectivity," *Representations*, no. 40 (1992).

¹³³ Mulkey and Gilbert, "Accounting for Error: How Scientists Construct their Social World when they Account for Correct and Incorrect Belief."

¹³⁴ Bruno Latour, *We have never been modern* (New York: Harvester Wheatsheaf, 1993), 92

¹³⁵ Bloor, *Knowledge and social imagery*.

¹³⁶ I am alluding here to the "no-miracle argument" developed by Hillary Putnam. Putnam deals with the question of how to explain the success that experts theories have shown to tell us how things in the world functions and how they will behave. His insight is that we should go with our first instinct and assume that this success is better explained if we accept that these thesis have got it right – they have succeeded in describing, or at least came very close to describing reality not only as it may look like in our minds but "as it really is" – describing, that is, the mind-independent world. Putnam's aim, as he avers, is to sustain the conclusion that some theories approximate reality's features and are 'approximately true'. Putnam argues that if we want to negate that experts have this capacity to get close in their descriptions to the world as it really is (he calls this position anti-realist) then we have to come up with a good alternative for explaining success – an alternative, that is, that doesn't make expert's success look like a miracle. Putnam conclusion is that the less miraculous explanation available for why experts are successful in explaining and predicting things is the intuitive inference that they actually got it right. Putnam argument can be read as a challenge – 'I will stick with realism until you show me an alternative explanation for why experts' statements are so intuitive that doesn't make their success look like the work of angels'. It is not accident then that so many authors in contemporary sociology of knowledge have devoted their time to build precisely these alternative accounts, as in Actor-Network Theory talk of "splitting and inversion", for instance. See Hilary Putnam, *Philosophical Papers: Volume 1, Mathematics, Matter and Method* (Cambridge University Press, 1979). For an ANT-inspired take on the issue, see: Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Harvard University Press, 1999).

¹³⁷ Barry Barnes makes a similar point when he suggests that asymmetry is what phenomenologists call our natural attitude. In spite of the lip service we pay to plurality of opinions, Barnes find that we rarely doubt that our way of viewing the world mirrors reality as it actually is. When we think about knowledge, he says, we tend to see our understanding as the right view. Barnes suggests that this same inclination afflicts accounts given by experts. He notes that many experts' statements consist in distinguishing right from wrong, rational from irrational, scientific from mythic. Barnes argues that a consequence of this partiality is that the diffusion of statements that are widely accepted as warranted is barely studied. Their

acceptance is assumed to be an emanation of reality. Who, he asks, would raise questions about why we take a rock to be a rock? We assume the answer to be obvious. What is interesting to study is error: "Why on earth some people look to a rock and see god?" Only this kind of craziness is considered worth studying See: Barry Barnes, *Interests and the growth of knowledge*, Routledge direct editions (London ;Boston: Routledge and K. Paul, 1977); Barry Barnes, *Scientific knowledge and sociological theory*, Monographs in social theory (London ;Boston: Routledge & K. Paul, 1974).

¹³⁸ In his *Knowledge and Social Imagery*, Bloor goes through a range of research areas in the humanities in which this symmetric approach is used. He points to the work of anthropologist Marry Douglas on the relationships between the social organization of a group and the social cosmology it adopts. In the history of science, he points to authors of Marxist inspiration, as Boris Hessen's work on Isaac Newton's Principia or Henryk Grossmann's work on Mechanics, which explore the links between the content of scientific theories and economic and industrial developments. Pointing Donald Mackenzie's work on Eugenics, Bloor argues that were growing at that time evidences that non-scientific cultural factors influence the position-taking of experts. And finally, Bloor makes reference to Thomas Kuhn to say that the initialization of neophyte researchers in his disciplinary community also influence the way these scientists will later relate to the meaning of words and the perception they will hold of phenomenon. Bloor reviews these developments in an exercise of synthesis. From these exemplary works, he derives what he sees as the main methodological principles that characterize his way of doing strong research on the production of knowledge: (a) a methodological commitment to causality, for which Bloor means to say simply that the sociologist must seek to relate the conditions that lead to belief; (b) impartiality, meaning that the sociologist must avoid to differentiate beforehand what is right/wrong, rational/irrational, and instead respect the actors' perception of what is right and wrong; (c) reflexivity, for which Bloor means that the sociologist must recognize that his own accounts are beliefs that can be related to social factors; and finally (d) symmetry, for which Bloor means that the sociologist must avoid teleological explanations that assume that warranted belief is the product of a self-explanatory rational process, while only error is sociologically interesting. In other words, to be symmetric for Bloor is to assume that not only error but also warranted belief needs to have its social roots explored. Bloor, *Knowledge and social imagery*.

¹³⁹ This is what could be called the weak programme in the sociology of knowledge aims to do. Arbitrarily, we could gather as representatives of a first generation of this weak programme figures as diverse as Karl Marx, Karl Mannheim and Max Scheller, with their works on existential determination of social conscience and the survival of ideations. A second post II war wave is associated with the works of Talcott Parsons and especially Robert K. Merton. The standard historiography of contemporary sociology of knowledge takes Merton's work as its mirror image. In what is perhaps the clearest programmatic statement for the strong programme, Bloor argues that sociology of knowledge as practiced by Merton is concerned mainly with what Bloor calls "the distribution of knowledge". That is to say, this pre-bloorian sociology of knowledge is interested in understanding why a statement that is warranted doesn't get accepted among a social group and why unwarranted statements sometimes are accepted as warranted by some social groups (the classical example here is the Lysenko affair in the Soviet Union). Above all, the central concern of this pre-bloorian sociology is error: which social factors explain that unwarranted knowledge gets accepted. Breaking with this way of doing sociology of knowledge, Bloor argues that the sociologist must learn with physiology, which explains both the pathologic organism and the healthy one, or mechanics, which studies machines that don't work but also machines that do work. Bloor will defend that the sociologist must aim at the same symmetry.

That is to say, the sociologist must be as concerned with why something is taken as right as he is concerned in explaining why something is wrong. For an overview of sociology of knowledge before the strong programme, see: Robert K. Merton, "The sociology of knowledge," in *Twentieth Century Sociology*, ed. Georges Gurwitsch and Wilbert E. Moore (New York: Philosophical Library, 1945).

¹⁴⁰ Usually, we do learn what counts as the right answer in an ostensive manner, by seeing how the teacher and colleagues repeatedly continue the sequence. But as the teacher cannot follow the sequence forever, there is always a point at which we have to infer from a finite range of examples how we are to extend the rule.

¹⁴¹ Authors not always agree on how to read Wittgenstein's comments on rule-following. Read in a more sceptic spin, Wittgenstein's insight has been used as a launch pad to conventionalist arguments, as Bloor's suggestion that we look at the social dynamics of ostensive learning and practical enculturation through which the student in Wittgenstein's example learns how to react when asked to add two. Ethnomethodologist Michael Lynch reminds us that this sceptic reading is controversial among wittgensteinian philosophers. As an alternative to the sceptic reading, Lynch argues for an ethnomethodological reaction to Wittgenstein's thought experiment. Instead of developing a sociological explanation for how the kid is taught and drilled to perceive 2,4,6,8 as the right way to continue the sequence, Lynch suggests that we describe how student and professor negotiated during their interaction which of the reactions would be appropriate. In the next draft, when considering how examiners generate interest for their recommendations, I dwell on this tension between explaining the acceptance of a thesis as right and describing the interaction through which it is established as right. For Bloor's appropriation of Wittgenstein in conventionalist terms, see Bloor, "Wittgenstein and Mannheim on the sociology of mathematics." For Lynch's ethnomethodological reading, see Lynch, *Scientific Practice and Ordinary Action: Ethnomethodology and Social Studies of Science*, p. 161; Hacking also suggested that Bloor's use of Wittgenstein insight on finitism, although productive in its own terms, goes beyond Wittgenstein's argument. Ian Hacking, "Wittgenstein Rules," *Social Studies of Science* 14, no. 3 (1984).

¹⁴² Bruno Latour, "The Powers of Association," in *Power, Action and Belief. A New Sociology of Knowledge?*, ed. John Law (Keele: 1986).

¹⁴³ For showing me the possibility of being partial without being judgmental, I thank professor Annemarie Mol and all colleagues of the Netherlands Graduate Research School of Science, Technology and Modern Culture. Mol, *The body multiple: ontology in medical practice*.

¹⁴⁴ Harold Garfinkel, *Studies in Ethnomethodology* (Wiley, 1991), 36.

¹⁴⁵ Bloor calls this intuitive assumption – that warranted belief is self-explanatory and a natural emanation of the rational application of reason and a scientific method – the "teleological vision" of the relation between knowledge and rationality, which he associates with the work of Imre Lakatos. The underlying assumption of this teleological vision is that we are rational animals and that our brains have a capacity to perceive when something makes sense rationally. The assumption is that we accept the right because it is right. "When we do what is logical and proceed adequately, nothing more needs to be said". This teleological vision is everything that Bloor rejects. It violates the principle of symmetry: only error needs to be explained, while warranted belief is taken to be the fruit of the proper use of reason and method. As Bloor puts it, if the teleological model is right then the strong programme is false. Bloor, *Knowledge and social imagery*, 9.

¹⁴⁶ Harry Collins, *Changing Order: Replication and Induction in Scientific Practice* (University of Chicago Press, 1992), 79.

¹⁴⁷ Raimo Siltala, *Law, truth and reason: a treatise on legal argumentation*, vol. v. 97, Law and philosophy library (Dordrecht ;New York: Springer, 2011), 70.

¹⁴⁸ The driving insight is, again, holism: the suggestion that experts need to rely on a series of auxiliary theories and assumptions to make any statement about the functioning of the world. The basic problem has to do with whether the comparison of research results can ever offer logically conclusive justification for discarding on of the thesis as wrong.

¹⁴⁹ Pierre Duhem, *The Aim and Structure of Physical Theory* (Princeton University Press, 1991), 183.

¹⁵⁰ W. V. Quine, "Main Trends in Recent Philosophy: Two Dogmas of Empiricism," *The Philosophical Review* 60, no. 1 (1951): 24.

¹⁵¹ According to Collins, the theory that the signals were signals of strong radiation became universally disbelieved. Collins, *Changing Order: Replication and Induction in Scientific Practice*, 81.

¹⁵² *Ibid.*, 84.

¹⁵³ In Chapter 2, I explored a similar controversy involving a Conare officer and an UNHCR representative. To corroborate his position for recognition of a claim made by a Colombian asylum seeker, UNHCR officer presented an internal UNHCR report describing areas of FARC presence in Colombia. Conare's officer didn't agree. He was convinced that UNHCR officer had misread or misrepresented a report's conclusions. He did his own research and found a 'more precise' report by the US state department that he saw as contradicting the UNHCR report and therefore supporting his recommendation for denial. I mentioned this controversy in the last draft to bring out the asymmetry in these examiner's comments. I sought to map how the discussion shifted registers; from a discussion about which recommendation was better supported into a discussion on how trustable was the UNHCR officer.

¹⁵⁴ UN High Commissioner for Refugees (UNHCR), "Note on Burden and Standard of Proof in Refugee Claims," 3.

¹⁵⁵ Harry Collins, "II.3 What is TRASP?: The Radical Programme as a Methodological Imperative," *Philosophy of the Social Sciences* 11, no. 2 (1981); Harry Collins, "Introduction: Stages in the Empirical Programme of Relativism," *Social Studies of Science* 11, no. 1 (1981); Steven Yearley, *Making Sense of Science* (SAGE Publications, 2005), 29.

¹⁵⁶ Latour's original phrase is, of course, much better construed: "the essential point is that the facts, contrary to the old adage, obviously do not 'speak for themselves': to claim that they do would be to overlook scientists, their controversies, their laboratories, their instruments, their articles and their hesitant speech, interrupted occasionally by deictic gestures, which only make things audible and visible". In Latour, *The Making of Law: An Ethnography of the Conseil D'Etat*, 208.

¹⁵⁷ Yves Gingras and Silvan S. Schweber, "Constraints on Construction," *Social Studies of Science* 16, no. 2 (1986): 376.

¹⁵⁸ Latour, *Pandora's Hope: Essays on the Reality of Science Studies*, 304.

¹⁵⁹ In: UN High Commissioner for Refugees (UNHCR), "Quality Initiative Project Sixth Report to the Minister (Strictly Confidential)," ed. UNHCR (2009), 13.

Chapter 3

Disclosing Strength

¹⁶⁰ UN High Commissioner for Refugees (UNHCR), "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," (Geneva 2011), 16.

¹⁶¹ Mol, *The body multiple: ontology in medical practice*, 20.

¹⁶² Law, *After method: mess in social science research*, 19.

¹⁶³ *Ibid.*, 19.

¹⁶⁴ Brasil, "LEI Nº 9.474, DE 22 DE JULHO DE 1997." My translation.

¹⁶⁵ Jubilut, *O Direito Internacional dos Refugiados e sua aplicação no ordenamento jurídico brasileiro*, 197. My translation.

¹⁶⁶ Recording #23 (At: 5 min 46 sec.).

¹⁶⁷ For a discussion on how electricity has the power to object human action, see: Jane Bennett, *Vibrant matter: a political ecology of things* (Durham: Duke University Press, 2010).

¹⁶⁸ Practical limitations like these are bordering in any useful definition of the term. True, they don't fit the received image of what a border is. There's no stall and check point. They aren't so much about separating the insider from the flat-out outsider, the friend from the enemy. But don't be fooled by their apparent banality. These small bureaucratic moments establish lines. The separations they make between the group and the Other is more civil, more immanent in form. They distinguish between the proper refugee and "the-person-who-would-be-more-adequately-classified-as-an-economic-migrant". They help set the difference between the credible claimant and the liar, the unfounded application and the legit asylum request. They're politically important, especially because they don't look like much. No trumpets are sounded when they happen. So they can go on happening, unchallenged. As the political theorist Jef Huysmans tells us, the way mobility is today rendered as a security problem in western societies is so diffused, so widespread, that it gets hard to identify a point of gravity where this security-making takes place. Huysmans speaks of this predicament as one in which ostensive security-making gives room to little security nothings. What I've sought to illustrate with these messy stories is that the day to day of status determination in Brazil is stricken by instances like this. For the insight on the diffused nature of security rendition, see: Huysmans, "What's in an act? On security speech acts and little security nothings."

¹⁶⁹ For teaching me to take discomfort seriously as an analytical tool, I thank Professor Helen Verran. Helen Verran, *Science and an African Logic* (University of Chicago Press, 2001).

¹⁷⁰ John Law, "What is wrong with a one-world world?," (2011), <http://www.heterogeneities.net/publications/Law2011WhatsWrongWithAOneWorldWorld.pdf>

¹⁷¹ Collins insight on the experimenters regress had tremendous impact over the science studies literature. It added a practical element to the discussion on knowledge making with the insight on the practical challenges to replication. He developed in detail the insight that examiners are rarely repeating the same experiment both (a) because replication is in practice extremely hard

(it takes precise time keeping, exact replication of laboratorial conditions and so forth) and also (b) because experts have little incentive to repeat experiments, being more driven instead to execute what they see as better experiments. Collins's work also offered a demonstration of under-determination thesis. He moved on from his careful demonstrations of the argument that that nature could not possibly be what decided the disagreement to argue that, instead, scientists decided on which experiment to trust relying on super-empirical values. "Where such a clear criterions (for what counts as good experiment) is not available", he argued, "the experimenter's regress can only be avoided by finding some other means of defining the quality of an experiment". In his works, Collins offers a list of these super empirical values, ranging from their opinions on the professional capacity of the scientists to their nationality. He argues that, once a core-set of leading scientists working around a topic is convinced, they start working as if that was the proper way of conducting the research on the issue. This, he argues, creates a social dynamic of channelling of resources that led to the marginalization of the adepts of alternative theories. Collins, *Changing Order: Replication and Induction in Scientific Practice*, 84.

¹⁷² Ibid., 88-89.

¹⁷³ Law, *After method: mess in social science research*, 19.

¹⁷⁴ UN High Commissioner for Refugees (UNHCR), "Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee," 4.

¹⁷⁵ Law, "What is wrong with a one-world world?."

¹⁷⁶ Ibid.

¹⁷⁷ Collins, *Changing Order: Replication and Induction in Scientific Practice.*, 16

Chapter 4

Judging Consistency

¹⁷⁸ UN High Commissioner for Refugees (UNHCR), "Beyond Proof, Credibility Assessment in EU Asylum Systems : Summary," (2013), 149.

¹⁷⁹ Mol, *The body multiple: ontology in medical practice*.

¹⁸⁰ Mol, "Ontological politics. A word and some questions," 75.

¹⁸¹ Building on the works of Simone de Beauvoir and Monique Witting, Judith Butler has attempted to break with the idea that gender identity is determined by our biology. She argues that the fact that one has a penis doesn't automatically makes an individual a man, as having a vagina doesn't necessarily makes an individual a woman. There is a lot more involved in this performance: one's gestures, way of speaking and other patterns of behaviour that influence how she or he is made sense of. Mol agrees with Butler that performances are not reducible to biology. But she also insists that saying that biology doesn't determine gender is not the same then saying that material things, like penis and vaginas, bowl ties and high heels don't play any part in an individual's performance of gender. The mistake in biological determinism is not so much that it says that penis and vaginas are important elements in gender performance. The mistake is in presuming that they always are the defining element, for any performance, anywhere, through any practices. What Mol suggests is that in some of these practical performances, the penis or the vagina can indeed play a key role in establishing a gender identity while, in other performances, other elements can prove more important. As Mol says, to perform a man in vestiaries without a penis can be a very difficult performance to maintain.

When one is attending a work meeting, however, to rely on the penis to perform his gender identity as man would be at least frowned upon. Performances, then, we are being told, are not only social. They are social-material achievements. Mol, *The body multiple: ontology in medical practice*, 168. For Butler's argument, see: Judith Butler, *Gender trouble: Feminism and the subversion of identity*, 10th anniversary ed. (New York: Routledge, 1999), 141.

¹⁸² John Law once explained this argument as an extension of the insight that reality is not destiny which I commented on the last chapter. This is indeed a useful way of describing it, I think: The point of enactment is that depending of which experimental assemblage is used and becomes diffused we have a corresponding version of "how reality is" (here it is worth it remembering Collins and Law point again: the determination of how reality is and of which experimental apparatus is reliable are "co-extensive"). That granted, what is conveyed by notion of multiplicity is that we can speak of one universe, but this at first sight single universe can be an universe in which strong radiation exist *and* an universe in which strong radiation does not exist, depending on which experimental assemblage we use. The cosmos here is one in the sense that employers of both apparatus are sure they are describing "the" cosmos, but is also more than one. Or, to invert the slogan, the cosmos here is many, but is also less than many. It is accepted to be "singular" while practically being more than one. It is multiple.

¹⁸³ Annemarie Mol, "Cutting Surgeons, Walking Patients. Some Complexities involved in Comparing," in *Complexities: Social Studies of Knowledge Practices*, ed. John Law and Annemarie Mol (Duke University Press, 2002).

¹⁸⁴ Take the mode of coordination through hierarchy (one reality wins), for instance: the example Mol gives involves a patient and a technician involved in the practice of diagnosing by the execution of a Doppler scan. Mol describes this scene as an example open, explicit, visible disagreement between two ways of enacting the diagnosis: the way of enacting the diagnosis #1 (the experimental apparatus #1, so to speak) involves the patient, the technician and relies on the patients' feeling as the favoured technique (this would be something as the statistic method favoured, if we were to insist on the parallel with what I said in draft 4 about Collin's case study). The way of enacting the diagnosis #2 also involves the patient, the technician, but the favoured criterion is not the patient's feelings but the pressure-ratio found by the Doppler test. Mol tells us that, in this episode, there was an open disagreement, an open and explicit mismatch, an open incoherence – that is to say, two ways of enacting the diagnosis are openly bridged and openly don't align. Mol tells us that the resolution of this mismatch involved one of the ways of enacting the diagnostic (one of these two experimental apparatus) being taken as more reliable and thus informing the diagnostic. Mol, *The body multiple: ontology in medical practice*, 55.

¹⁸⁵ *Ibid.*, 104.

¹⁸⁶ *Ibid.*, 104.

¹⁸⁷ If we open a medicine book and look at the principles' half, we will find chapters on things like genetic and immunological sources of disease. If we check the practice's half, in turn, we will find sections with titles like diagnostic techniques and care. Medical principles give the foundations on which medical practice stands. Practices are the things that doctors do in their day to day work. Berg and Mol tells us that, as the discourse goes, it is in the passage from principle to practice that doctors sometimes lose their way. While in a perfect world the medical practice should "rest upon the foundations of principles", in the rotted reality in which we live "extra-scientific factors such as insecurity, pressure, emotions, scarcity, time-constraints, lead it to depart from the ideal". Annemarie Mol and Marc Berg, "Principles and practices of medicine. The co-existence of various anemias," *Cult Med Psychiatry* 18, no. 2 (1994): 247.

¹⁸⁸ Ibid. For a discussion on how inconsistency can be lived with, see also: Steve Hinchliffe, *Geographies of Nature: Societies, Environments, Ecologies* (SAGE Publications, 2007).

Chapter 5

Making Decisions

¹⁸⁹ Liliana Lyra Jubilut and Silvia Apolinário, "Refugee Status Determination in Brazil: A Tripartite Enterprise," *Refuge: Canada's periodical on refugees* 25, no. 2 (2008): 32.

¹⁹⁰ Roxanne Lynn Doty, "States of Exception on the Mexico–U.S. Border: Security, "Decisions," and Civilian Border Patrols," *International Political Sociology* 1, no. 2 (2007); Fleur Johns, "Guantánamo Bay and the Annihilation of the Exception," *European Journal of International Law* 16, no. 4 (2005).

¹⁹¹ Jef Huysmans, "The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society," *International Political Sociology* 2, no. 2 (2008).

¹⁹² Ibid.

¹⁹³ Huysmans, "What's in an act? On security speech acts and little security nothings."; Louise Amoore and Marieke de Goede, eds., *Risk and the war on terror* (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2008).

¹⁹⁴ Michael Lynch et al., *Truth Machine: The Contentious History of DNA Fingerprinting* (University of Chicago Press, 2010).

¹⁹⁵ Ibid., 251.

¹⁹⁶ Karl R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge, 2002).

¹⁹⁷ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996).

¹⁹⁸ Paul K. Feyerabend, *Against Method* (Verso, 1993).

¹⁹⁹ Thomas F. Gieryn, "Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists " *American Sociological Review* 48, no. 6 (1983).

²⁰⁰ Ibid., 781.

²⁰¹ Gieryn mentions some very down to earth ways in which this boundary-making can happen: things like journal editors selecting manuscripts and funding agencies channelling resources. In his study, however, he explores boundary-work in a more conventional historiographical way. He looks at how the demarcation between scientific and non-scientific knowledge was achieved in Victorian England, at how phrenology was marginalized as a pseudo-science in early 1800's Edinburgh, and at how the US academic community struggled to retain its autonomy when faced with the politicization of research during the cold war. Ibid.

²⁰² Sheila Jasanoff, *Science at the Bar* (Harvard University Press, 1997).

²⁰³ Ibid., 53.

²⁰⁴ UN High Commissioner for Refugees (UNHCR), "Note on Burden and Standard of Proof in Refugee Claims," 2.

²⁰⁵ Mr Z's case becomes particularly interesting if we consider its connection to the case of Cesare Battisti - a cause celebre in Brazil. Battisti was member of a far-left communist militant group during the years of violent political turmoil in Italy which lasted between 1960 and 1980. Tried in absentia, he was charged for his participation in an armed group and for the killing of police officers and other two men. After fleeing to France and living under an alias in Brazil, Battisti was arrested in Rio in 2007. The case gained notoriety when the then Brazilian Justice Minister granted Battisti the status of political refugee (executive asylum), while the Italian government continued to ask for extradition, with the support of the European Parliament. On 2009, the Brazilian Supreme Court overruled the decision by the Justice Ministry, thus allowing extradition. At the same time, however, the Court reaffirmed the President's constitutional authority to deny extradition requests. Battisti's case thus gave rise to a discussion on whether appeals on asylum requests can be extended to the President's Office, beyond the dismissal of appeal by the Justice Minister. Mr Z's case benefited of this opening. After Mrs Z's request was denied by the Justice Minister, Caritas's lawyer forwarded Mr Z's case to the Federal Defence Attorney's Office, who formalized an appeal request on Mr. Z's behalf.

²⁰⁶ Collins, *Changing Order: Replication and Induction in Scientific Practice.*, 33

²⁰⁷ The thought experiment continues until sieve 7, showing many challenges with which the philosopher-mice could be confronted. In level 3, Collins considers that the possibility of finding a murine rule by saying something like "a test counts as scientific when it is scientifically done", but, as you will have presumed, this only moves the problem to arms' length. When you speak of scientifically done, you can have in mind norms a norm like, the replication of an experiment won't be considered reliable if it is conducted by a biased replicator. But here Collins would ask: "what is the permitted range of belief" for proper scientific minded replicator? Assuming a murine solution, our philosopher-mice will in the next level of complexity have to deal with the issue of to decide whether the test should count as a full test or was just a preliminary run. In level 5, the issue of experimental competency I discussed on chapter 4 comes to the fore: the judgment of consistency across results assumes as a starting point that both experiments have been properly conducted. But what counts as competent execution? In dealing with this question Collin's philosopher-mice will likely be confronted with complexity level 6, also discussed in chapter 4, which have to with the potential for experimenter's regress. Ibid., 39-43.

²⁰⁸ Ibid., 44.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid., 36-37.

²¹² Exploring a related question in ethnomethodological style, Steve Woolgar asks how experts accomplish connections between research documents and the reality they purport to represent. He has in mind assessments like 'this fit is good enough' and 'these results match'. He acknowledges as a starting point the existence of philosophical and methodological arguments like Collins's, which see assessment of consistency as "in principle inadequate, indefensible and", at last rate, "impossible". These arguments form what Woolgar describes with poetic verve as "a Pandora's box of horrors" hovering over scientists' work. See: Steve Woolgar, "Time and documents in researcher interaction: Some ways of making out what is happening in experimental science," *Human Studies* 11, no. 2-3 (1988): 172.

²¹³ Saltzman, "Beyond the Law: Power, Discretion, and Bureaucracy in the Management of Asylum Space in Thailand," 4.

²¹⁴ See footnote 31 above.

²¹⁵ Saltsman, "Beyond the Law: Power, Discretion, and Bureaucracy in the Management of Asylum Space in Thailand," 4.

²¹⁶ Lilliana Lyra Jubilut, "O Procedimento de Concessão de Refúgio no Brasil ", Portal do Ministério da Justiça (Brasília: Brazilian Justice Ministry 2005). My translation

²¹⁷ Lynch et al., *Truth Machine: The Contentious History of DNA Fingerprinting*, 243-78.

Chapter 6

Enacting Refugees

²¹⁸ Latour, *Science in Action: How to Follow Scientists and Engineers Through Society*, 258.

²¹⁹ Saltsman, "Beyond the Law: Power, Discretion, and Bureaucracy in the Management of Asylum Space in Thailand," 458.

²²⁰ *Ibid.*, 460.

²²¹ For a discussion on reflexivity in science studies, see: Yearley, *Making Sense of Science*, 100.

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